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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SILAS CROSS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES J. HERRMANN
Counsel of Record For
Petitioner Silas Cross

HERRMANN, LEVENSON,
MARGULLIS AND RAY
819 South K Street
Tacoma, Washington
98405
(206) 627-8142

QUESTIONS PRESENTED

1. Whether the standard and method used to deny Petitioner's motions for a continuance, based on inadequate time to prepare for trial, are in conflict with those used by other federal courts of appeals pursuant to applicable decisions of this Court.

   a. Whether the denial of Petitioner's motions for continuance violated his sixth amendment right to effective assistance of counsel and fifth amendment right to due process and equal protection of the law.

2. Whether Petitioner was denied his constitutional right to due process and effective assistance of counsel by the denial of his motions for discovery under the federal rules and the government's

response to his requests made pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500.

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Petitioner, Silas A. Cross, through his counsel of record, Charles J. Herrmann, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered August 22, 1983, affirming his conviction under 18 U.S.C. §§ 371, 1163 and 25 U.S.C. § 450(d), and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinions of the court of appeals and district court are not published. A verbatim copy of the Memorandum Opinion, C.A. No. 82-1713, is attached at App. A. A verbatim copy of the Distrct Court order denying Petitioner's motion for leave to file motions is at App. B.1. The judgment of the District Court is at App. B.2. The Judgment of the United States Court of Appeals for the Ninth Circuit is at App. B.3.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals, (Kilkenny, and Fletcher, Circuit Judges and Jameson, Senior District Judge for the District of Montana), was entered on August 22, 1982. (See App. A). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fifth amendment to the United States Constitution provides in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ... .

U.S. Const., amend. V.

2. The sixth amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense.

U.S. Const., amend. VI.

3. Jencks Act, 18 U.S.C. section 3500 (1970) (as amended 1975) (text set forth at App. C.).

4. Federal Rules of Criminal Procedure, Rule 15 (as amended 1975) (USCS 1979) (text set forth at App. D.).

5. Federal Rules of Criminal Procedure, Rule 16 (as amended 1966 and 1975) (U.S.C.S. 1979) (text set forth at App. E).

STATEMENT

1. Jurisdiction in the court of first instance, the United States District Court for the Western District of Washington, was conferred under 18 U.S.C. section 3231, pursuant to Rule 18, Fed. R. Crim. P.

2. Petitioner and his co-defendant, Robert Satiacum, were arraigned on May 12, 1982 and released on personal recognizance bonds. On May 26, 1983, Petitioner filed a motion for continuance of trial and filing of motion dates. (App. F)

The co-defendant also filed a motion for continuance. His counsel stated that it would be impossible to be prepared for the July 6th trial regardless of how long his other trial, on an unrelated indictment, was delayed. [App. G, RT 6/11/82 p.3]

The court did not consider Petitioner's motion for continuance timely, despite the fact it was filed on the date set for filing motions.

> The Court: I called you in, counsel, especially Mr. Immelt, [counsel for Robert Satiacum] because I had some trouble understanding what the status of the motion for continuance is and whether it is still a motion. The only motion for a continuance I have in this trial is based on the fact that this case is going on simultaneously with Judge McGovern's case. ... [reference to co-defendant Satiacum's other trial].

Transcript of 6/11/82 Proceedings, p.2.

Petitioner filed his motion for continuance, (App. F), and motion for severance on May 26, 1983, the date set for pre-trial motions. (See App. H).

The record does not reveal why the court chose to recognize the Petitioner's severance motion and all but ignored the continuance motion. [App. G, RT 6/11/82 p.11]

Speaking to Mr. Immelt, the court said:

> The Court: You filed a motion asking for an extension which has never been granted.
>
> Mr. Immelt: I understand that.
>
> The Court: And I don't know if you are really still anticipating more motions or what they would be. I know there is one pending that is timely, that is Mr. Cross' motion to sever. I'm talking more about Mr. Satiacum.
>
> Mr. Immelt: To be quite honest, I do not anticipate filing any. ...
>
> The Court: Well, counsel, October is a much more difficult time for the court.

Transcript of Proceedings 6/11/82 p.7

On June 16, 1982, Charles J. Herrmann was proposed to the court as substitute counsel for the Petitioner. Due to a potential conflict-of-interest, the court did not approve the substitution until July 2, 1982.

[See App. H] This change was requested due to Mr. Emery's inexperience. [App. G, RT 7/2/82 p. 12, l.2]

At the June 16, 1982 hearing the court indicated the one week continuance previously offered to counsel for Petitioner's co-defendant, [App. G, RT 6/11/82 p.14],was contingent on the defendants agreeing to be tried by the court.[App. G, RT 6/16/82 p.5-6] Mr. Emery then repeated Petitioner's motion for more time to prepare. [App. G, RT 6/16/82 pp. 6-7]

The court reserved final decision on the trial date pending Petitioner's decision on whether or not to waive the jury.[App. G, RT 6/16/82, p.7-9]

When Mr. Herrmann told the court he felt he could be ready for trial, he had put in a total of six or seven hours on the case. [App. G, RT 6/16/82 p.8] As proposed substitute counsel Mr. Herrmann, requested time to file his own pretrial motions, and that

the court would entertain them. [App. G, 6/16/82 p. 25] Mr. Immelt reminded the court that his motion was to continue the trial date as well as the time to file motions. The court responded:

> The Court: Oh, I'm aware of that, counsel, but I'm also aware that as of the last meeting [June 11, 1982] it was everybody's representation to the court that we didn't have any additional motions in the case. Well, it's very difficult and puts the court in a difficult position to be ruling on motions just about the time we are starting the trial.

Transcript of Proceedings 6/11/82 pp. 25-26

Mr. Emery, as counsel for Petitioner never made such a representation to the court at the June 11 hearing. Mr. Herrmann certainly did not.

On June 28, 1982, Petitioner's proposed substitute counsel filed several motions, to-wit: Motion for Leave to File Motions, Motion for Change of Venue, Motion for Attorney Conducted Voir Dire, and Motion for

Production and Discovery. Seventy-two pages of memoranda of law and exhibits where filed in support thereof. [App. H]

The court refused to grant Petitioner's motion for leave to file motions on June 29, 1982. The basis for denying leave to file was that the motion was "tardy."

> The court unambiguously indicated that, to be considered, such motions would have to be filed almost immediately ... These tardy motions are clearly not the sort of expedited motions that the court suggested it might entertain due to the change of counsel. Rather, with trial five court days away, they put the court and the government at an extreme and unwarranted disadvantage. The motion is denied.

Order Denying Motion For Leave to File Motions, June 29, 1982, document No. 45, D.C. No. CR 82-20 TR. [App. B.1]

The pretrial conference was held on July 2, 1982, where Petitioner made several objections concerning discovery matters and stated the reasons therefore. Transcript of Proceedings, July 2, 1982.

Petitioner repeated his motion for a continuance on July 6, 1982, the first day of trial, which the court summarily denied. [App. G, RT A-1 pp. 3-7, 10, 33] Petitioner repeated his motion for continuance, on July 9, 1982. He pointed to specific prejudice occuring at that time. [App. G, pp.557-563, 572, 574]

After receiving the verdict, the court congratulated the jury on doing a fine job in "this complex case. ... [I]t hasn't been an easy case. It's an unusual case that's involved a lot of documentation ... ." Transcript of Proceedings, August 4, 1982 p.2581

3. Petitioner filed timely Notice of Appeal to the Ninth Circuit on November 24, 1982. The court affirmed. (App. B.3)

In its review of the denial of Petitioner's motions for a continuance, the court overlooked Petitioner's first and primary reason for the request, lack of time to pre-

pare for trial.[Compare App. A, with App. G, RT 7/6/82 pp. 3-7]. The court stated:

> It is well settled in this circuit that actual prejudice must be shown before the denial of a continuance will be reversed. Cross has failed to point to any specific prejudice resulting from the denial of a continuance. Nor does the record show any prejudice as a result of lack of preparation by trial counsel."

[App. A]

See, for example, App. G, RT 7/2/82 p. 25-28, 42-43, A-1 p. 3-7, 14, Vol. 3, pp. 551-563, 572, 574, where Petitioner pointed to specific examples of prejudice.

In addressing the issue of the requested exculpatory grand jury transcripts, the appeals court stated:

> The trial court reviewed the transcripts of the two witness's grand jury testimony in camera and decided that, based on United States v. Tierney, the Government's position in this case was correct. We agree.(Citations omitted)

App. A.

The trial judge did not review the tran-

scripts in camera.[App. G, pp. 2143-2144]

REASONS FOR GRANTING THE PETITION

1. This petition presents the question as to whether the standard and method used to deny the Petitioner's Motions for Continuances based on inadequate time to prepare for pretrial and trial proceedings and insufficient discovery, and the appellate review thereof, violated the Petitioner's fifth amendment right to due process and sixth amendment right to effective assistance of counsel.

Petitioner respectfully submits that the standard and method of review used in his trial and appeal are in conflict with those of other circuit courts and the decisions of this Court.

This Court recently granted a petition which raises the question of the correct standard of review of claims of ineffective assistance of counsel, in Strickland v. Washington, No. 82-1554, ruling below CA5,

693 F.2d 1243, 51 LW 2403, 32 CrL 2286 (review granted June 6, 1983).

The record clearly shows that Petitioner filed a timely motion for a continuance of the trial date and date to file motions. (App. F and H) The trial court all but ignored counsel's timely motion for continuance and renewals thereof. The record does not reveal that the trial court assessed the facts and circumstances at the times of the repeated motions and considered them before denying Petitioner's motions.

The appellate court review of these denials is a straightforward statement of the Ninth Circuit's general rule for review of a denial of a continuance motion.

The Ninth Circuit's reliance on United States v. Veatch, 674 F.2d 1217 (9th Cir. 1981), cert. denied, 456 U.S. 946 (1982) in review of the denial of Petitioner's motion for continuance is misplaced. In United States v. Veatch, the defendant requested a

continuance on the second and last day of his trial because the father of one of his three attorneys had passed away in the night. The differences in the facts and circumstances in Petitioner's case and Veatch are extreme.

Petitioner recognizes the fifth and sixth amendments do not specifically guarantee adequate time to prepare and obtain discovery prior to trial. Nonetheless, this Court has recognized that inadequate time to prepare a case can jeopardize an accused's sixth amendment right to effective counsel. Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). Determination of whether effective assistance of counsel was denied due to late appointment necessarily turns on the facts of the case. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970).

> It is not an answer to petitioner's claim for a reviewing court simply to conclude that he has failed to

> show that, with adequate assistance, he would have prevailed at trial. Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942).

Chambers v. Maroney, supra, 90 S.Ct. at 1985 (Harlan J., partial dissent and concurrence.)

The standard for review of a denial of a motion for a continuance is found in Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed. 2d 921 (1976).

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process ... . Contrariwise, a myopic insistance upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3,75 S.Ct. 1, 99 L.Ed. 4. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

In Powell v. Alabama, supra, 287 U.S. at 59, 53 S.Ct. at 60 this Court recognized:

> The prompt disposition of criminal cases is to be commended and en couraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

In United States v. King, 664 F.2d 1171 (10th Cir. 1981), the court found the defendant was deprived effective assistance of counsel when the trial court denied a motion for continuance. Counsel was given twenty-seven days to research, investigate, and prepare a defense. The court found the sophisticated charge, lengthy trial involving a plethora of witnesses and exhibits, and potential person term of five years where substantial reason to have granted the continuance requested by substitute counsel who was engaged for the defense approximately two weeks before trial. In United States v. King, supra, original counsel had also moved for a continuance, approximately

four weeks prior to trial. The substitute counsel entered fifteen days later and renewed the continuance motion.

The facts and circumstances of United States v. King, supra, are strikingly similar to the Petitioner's case. In Petitioner's case, original counsel moved for a continuance five weeks and five days prior to trial. This was renewed once again before trial and twice during trial. The order approving substitution of counsel was entered on the last court day before trial began. (App. H) Petitioner's counsel had twelve court days, after his first appearance, to investigate and prepare pretrial and trial matters. Seven of those days were devoted to pretrial motions. Upon review of facts and circumstances similar to Petitioner's, the Tenth Circuit stated:

> We conclude that adequate time for defense preparation is one of the rights afforded an accused under the sixth amendment and that King was unfairly deprived of this right as a

result of the district court's denial of his motions for continuance. ... Significantly, this sixth amendment guarantee is so fundamental that its deprivation will mandate reversal of a conviction even absent a showing that the resulting prejudice affected the outcome of the case.

United States v. King, supra, at 1172.

(Citing Powell v. Alabama, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932) and Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1941)).

The Tenth Circuit continued:

Although frequently the result of a slothful lawyer, inadequate preparation can also be caused by unreasonable time constraints imposed by a trial court. United States v. Olivas, 558 F.2d 1366, 1367 (10th Cir. 1977), cert. denied, 434 U.S. 866, 98 S.Ct. 203, 54 L.Ed. 2d 142 (1978). ... Although rulings on motions for continuance are traditionally best left to the trial court's discretion, a judge is not imbuded with the power to abrogate a criminal defendant's constitutional rights.

Under the circumstances of this case, the trial court's refusal to postpone King's trial date adversely affected defense counsel's ability to render constitutionally suffi-

> cient assistance to his client. King's conviction must be reversed.

United States v. King, supra, at 1173. Accord, United States v. La Monte, 684 F.2d 672 (10th Cir. 1982); United States v. Golub, 694 F.2d 207 (10th Cir. 1982); United States v. Gonzales-Palma, 645 F.2d 844 (10th Cir. 1981).

The Sixth Circuit is in accord with the Tenth Circuit on this question. In Linton v. Perini, 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162, 102 S.Ct. 1036, the court found the defendant's sixth amendment right to effective assistance of counsel was violated because the "ten or fourteen days" counsel had to prepare were inadequate.

The court stated:

> To say that appellant's attorney's modest request for more time to investigate a very serious felony case was dilatory is to stretch credulity. Even in the absence of an evident showing of prejudice to the defendant, the facts here are

sufficient to merit reversal of the District Court.

Id. at 211.

The court noted a key consideration in the right to counsel under the sixth amendment is a reasonable opportunity to employ and consult with counsel. (Citation to Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1959)). Accord, Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam).

The standard of review in the Sixth Circuit is to weigh the right to counsel, tempered by the consideration that it not interfere without proper reason with the normal progress of the case. Conversely, the government may not arbitrarily interfere with the right to effective assistance of counsel in the name of docket control.

Similar standards were announced by the Second Circuit in Gavino v. MacMahon, 499 F.2d 1191 (2nd Cir. 1974).

The Seventh Circuit followed this Court's holding in Ungar v. Sarafite, supra, in United States v. Jones, 369 F.2d 217 (7th Cir. 1966). Accord. United States v. Phillips, 640 F.2d 87 (7th Cir. 1981), cert. denied, 101 S.Ct. 2331.

Several Eighth Circuit decisions have addressed the sixth amendment question presented by Petitioner. In Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975), the court stated:

> In each case we must weigh, among other factors, the time afforded counsel, the experience of counsel, the gravity of the charge, and the complexity of the possible defenses as well as the accessibility of witnesses to counsel. We stress, also, that although the adequacy of counsel cannot be determined solely on the basis of the amount of time spent in preparation, we cannot minimize the fact that effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial. As the Third Circuit has noted:
>
> > Adequate preparation for trial often may be a more important element in the effective assistance of counsel to

which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge.

* * * * * * * * *

* * The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance. Moore v. United States, 432 F.2d 730, 735, 739 (3rd Cir. 1970) (en banc) (footnote omitted).

. . . In McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), . . . we quoted the American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and the Defense Function § 4.1 (Approved Draft 1971) [hereinafter ABA Standards]:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer

of facts constituting guilt or his stated desire to plead guilty.

Counsel must be given time to discharge this duty

Wolfs v. Britton, supra, at 309-310.

In United States v. Little, 567 F.2d 346 (8th Cir. 1977) the court applied the following test:

> The trial judge must balance a number of considerations in rendering his decision. One consideration is the nature of the case itself. In a complicated case, or one set for trial before adequate time has been provided for trial preparation, equity favors a continuance. (citations omitted). A second factor must be the diligence of the party requesting the continuance. United States v. Collins, 435 F.2d 698 (7th Cir. 1970), cert. denied, 401 U.S. 957, 91 S.Ct. 983, 28 L.Ed.2d 241 (1971). If the party has not been dilatory or negligent in the preparation of his case, and yet still needs more time before trial, that party obviously has a greater claim to a continuance. Third, the trial judge just consider the conduct of the opposing party.
> If the other side has been uncooperative, or tardy in making material available that the movant has a right to discover, then the court must take that into account. (citations omitted). Fourth, the court must assess the effect of the con-

> tinuance. ... Fifth, the court must consider the asserted need for the continuance.

Id. at 348 - 349; cited with approval in United States v. Bernhardt, 642 F.2d 251 (8th Cir. 1981).

In United States v. Olson, 697 F.2d 273, 275 (8th Cir. 1983) the Eighth Circuit found the trial court's method of ruling on the motion for continuance improper because it failed to properly balance the five factors set forth in United States v. Bernhardt, supra.

The Fifth Circuit has also criticized the district court for failure to state the reason(s) for denial of a request for a continuance.

> The court articulated no reason for its decision to deny attorney Petrella's unopposed request for a two week continuance to permit adequate time for preparation ... .

Alford v. United States, 709 F.2d 418, 423 (5th Cir. 1983). Linton v. Perini, supra, cited with approval.

In United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976), the court listed the following factors as highly relevant in assessing claims of inadequate preparation time:

> [T]he quantum of time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, and the availability of discovery from the prosecution. We have also explicitly considered the adequacy of the defense actually provided at trial, the skill and experience of the attorney, any pre-appointment or pre-retention experience of the attorney with accused or the alleged crime, and any representation of the defendant by other attorneys that accrues to his benefit.

Id. at 1286.

While the court upheld the denial under the facts of this case, it stressed:

> [We] must reiterate that a scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial. If forcing a defendant to an early trial date substantially impairs his ability to effectively present evidence to rebut the prosecution's case or to

establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purposes in the criminal justice system than the delay of a few days or weeks that may be sought.

Id. at 1291.

United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978) is a leading case in the District of Colombia Circuit on an analogous issue. In Burton, supra, the appellant challenged the denial of his motion for a continuance to replace one of his two attorneys. The court stated:

> [W]hen the continuance is sought to retain or replace counsel, the defendant's Sixth Amendment right to the assistance of counsel is implicated. In such circumstances, the right to select counsel must be carefully balanced against the public's interest in the orderly administration of justice.
>
> Thus, the trial judge may not insist on such expeditiousness that counsel for the defendant lacks reasonable time to prepare for trial; stripping away the opportunity to prepare for trial is tantamount to denying altogether the assistance of counsel for the defense. On the other hand, the defendant cannot insist on an unnecessary delay or a delay of

unreasonable proportions.

> We recognize that the right to choice of counsel devolves not only from the due process clause of the Fifth Amendment but also from the more stringent and overlapping standards of the Sixth Amendment.

Id. at 480-490.

The court continued to state that determination of whether defendant's rights were protected depend upon the circumstances of the case. In the District of Columbia Circuit, the trial court is required to evaluate the totality of the circumstances before reaching a reasonable conclusion that the delay would be unreasonable in the context of the particular case. Id. at 490. The reasonableness of the delay depends on all the surrounding facts and circumstances. The D.C. Circuit Court of Appeals listed twenty factors to be considered in this analysis. Id. at 490-491.

Petitioner respectfully submits that the method and standard of review used by the

Ninth Circuit in his appeal conflicts with the decisions of the other circuits and this Court as set forth supra. In direct contrast to the Ninth Circuit, other circuit courts take great care in reviewing the question Petitioner presented to the Ninth Circuit. The Sixth and Tenth Circuits do not require the defendant to point to specific prejudice as does the Ninth Circuit. Petitioner did, however, point to specific prejudice several times. (See Statement of Case, supra.)

Examination of the transcript, facts and circumstances of the case, and memorandum decision of the United States Court of Appeals for the Ninth Circuit reveals that Petitioner was seriously prejudiced by the trial court's denial of his motions for a continuances and the summary review of that denial by the Ninth Circuit. The trial court failed to consider any of the factors considered by the other circuits' district

courts. The Petitioner's original motion was hardly considered at all. The Ninth Circuit failed to properly review this district court action by considering the factors deemed relevant by other circuit courts and this Court. Petitioner urges that the cursory process in the district and appellate courts warrants review of his case by this Court.

2. Petitioner argued at trial and on appeal that his fifth amendment right to due process and sixth amendment right to effective assistance of counsel were denied by his inability to obtain discovery, exculpatory materials and incomplete responses to his requests under Brady and the Jencks Act. The transcript documents the disadvantages Petitioner suffered because of this.

The district court did not review in camera the requested exculpatory evidence, as stated by the Ninth Circuit in its opinion. The district court declined to

review the transcripts in question (in part due to their bulk) under the rule of United States v. Tierney, 424 F.2d 643 (9th Cir. 1970). In that case, the court found the only reason for the request was to tailor the witness' trial testimony to avoid inconsistencies. Id. at 646. This was not the reason advanced in Petitoner's case. Counsel for Petitioner had reason to believe the requested material contained exculpatory evidence. It is impossible to state whether the requested material would have affected the outcome of the case because neither the court nor the defendnt saw the requested material. In United States v. Jones, 612 F.2d 453, 456 (9th Cir. 1979) the Ninth Circuit expressly deemed in camera examination of the requested material the proper procedure.

Petitioner objected to the trial court's denial of his request for court ordered depositions under Fed. R. Crim. P. Rule 15,

and discovery under Rule 16. The government objected, stating fears of fabrication of evidence, but without offering proof thereof to override Petitioners need to investigate in his search for relevant fact and truth. Petitioner had reason to believe some of the government's exhibits had been forged by its main witness, and counsel requested time to investigate matters relevant to the credibility of the government's main witness and the innocence of the Petitioner.

Justice Brennan's opinion was that the fallacy of "the old hob goblin perjury" has been starkly exposed by the civil system. "Indeed, ... liberal discovery, far from abetting, actually deters perjury and fabrication." Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279, 291.

This Court Stated:

> The adversary system of justice is hardly an end in itself; it is not yet a poker game in which the

> players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial ... . Williams v. Florida, 399 U.S. at 82.

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973).

Petitioner respectfully asserts the denial of his requests for exculpatory evidence and other discovery, made in the search for relevant fact, impermissibly infringed on his right to due process, and equal protection, of the law. Dennis v. United States, 384 U.S. 855, 873, 86 S.Ct. 1840, 1851, 16 L.Ed. 2d 973 (1966). The Ninth Circuit dismissed review of Petitioner's request for discovery by citation to Weatherford v. Bursey, 429 U.S. 545 (1977). That case is easily distinguishable on its facts and circumstances.

In United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980), the court found the

appellant was deprived of the informed and deliberate judgment of counsel where Jencks materials were received by counsel for the first time on the morning of trial. (Counsel sought to read the relevant Jencks materials while the suppression hearing was in progress).

The record in Petitioner's case documents the government's last minute deliver of some Jencks material, which counsel was obliged to digest with insufficient time to prepare effective cross-examination. Again, the refusal to disclose at an earlier time was based on the vague ungrounded fear held by the government that to do so would lead to fabrication of evidence.

The due process clause speaks "to the balance of the forces between the accused and his accusor." Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed. 2d 82, 87 (1973). The rationale of due process is that "unequal access to opposing

parties' information prior to trial may deprive a defendant of a fair trial." Brown v. Wainwright, 459 F.Supp. 244, 247 (M.D. Fla. 1978). Petitioner respectfully submits that was precisely the situation in his case.

Petitioner submits the Jencks Act unconstitutionally deprived him of due process of law. Petitioner requests this Court to consider court instituted liberalization of criminal discovery. As Justice Brennan wrote:

> Assuming that, as I believe, we should adopt broader criminal discovery, should the definition of its limits be a matter for legislatures or court? I incline to believe that just as discovery in civil causes is largely a matter of court rules, so also should be the fashioning of rules for criminal discovery.

Brennan, J., The Criminal Prosecution, 1963 Wash. U.L.Q. 279, 293.

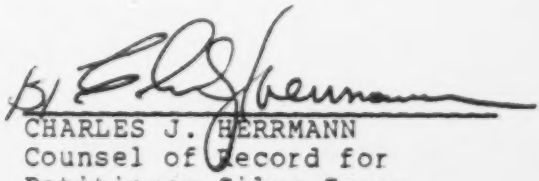
CONCLUSION

Petitioner respectfully submits that there is a clear conflict between the Ninth

Circuit's decision and those of other circuits as set forth in this petition. The record shows his timely motion and three subsequent requests for a continuance were not properly considered at trial or on review. Furthermore, Petitioner was denied adequate time to examine critical evidence and denied access to requested exculpatory evidence. Petitioner was prejudiced thereby, and pointed to this prejudice before, during, and after trial.

For these reasons and others discussed this petition, supra, Silas Cross requests this Court to accept review of his case.

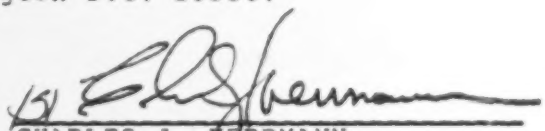
Respectfully submitted this 20th day of October, 1983.



CHARLES J. HERRMANN
Counsel of Record for
Petitioner Silas Cross

CERTIFICATE OF SERVICE

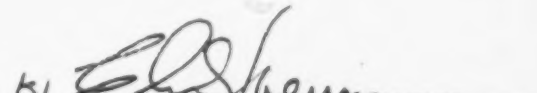
Pursuant to Supreme Court Rule 28.4(a), three copies of this petition were delivered to the United States Post Office at Tacoma, Washington on October 20th, 1983, addressed to the Solicitor General, Department of Justice, Washington D.C. 20530.



CHARLES J. HERRMANN
Counsel of Record for
Petitioner Silas Cross

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 28.3, three copies of this petition were delivered to the United States Post Office at Tacoma, Washington on October 20th, 1983, addressed to the Peter O. Mueller, Assistant U.S. Attorney, 3600 Seafirst Fifth Avenue Plaza, 800 Fifth Avenue, Seattle, Washington 98104.



CHARLES J. HERRMANN
Counsel of Record for
Petitioner Silas Cross

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SILAS CROSS, Defendant-Appellant.	C.A. NO. 82-1713 D.C.NO. CR82-20-T-R MEMORANDUM

Argued and Submitted -- June 10, 1983

Decided -- 8-22-83

Appeal from the United States District Court
For the Western District of Washington
Barbara J. Rothstein, Judge, Presiding

Before: KILKENNY, and FLETCHER, Circuit Judges and JAMESON,* District Judge.

Silas Cross has appealed his conviction, following a jury trial, of one count of of [sic] conspiracy to embezzle and misapply funds of the Puyallup Tribal Health Authority in violation of 18 U.S.C. § 371

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

(Count I); 19 substantive counts of embezzlement of Tribal Authority funds, in violation of 18 U.S.C. § 1163; and four counts of misapplication of Indian Self Determination Act contractual funds, in violation of 25 U.S.C. § 450(d). We affirm the judgment of conviction on each count.

Cross is former vice-chairman of the Puyallup Tribe of Indians, Tacoma, Washington. He was indicted with a codefendant, Robert Satiacum, former tribal chairman, and Thomas Carpenter, former executive director of tribal health funds. All were charged with conspiracy under Count I. Cross was further named in 36 substantive counts. Satiacum was charged jointly with Cross in a number of counts and individually in several others. Carpenter had previously pled guilty to embezzlement of Tribal health funds and was the Government's principal witness at trial.

Trial against Cross began on July 6, 1982, before the court and jury.[1] Satiacum, having waived a jury, was to be tried simultaneously by the court. On July 14, after a series of disputes between Satiacum and his counsel, the court permitted Satiacum's attorney to withdraw, and severed and continued the case as to Satiacum. The jury trial of Cross then continued to July 23. After a week's recess, the trial resumed, and the case went to the jury on August 2. On August 4 the jury returned its verdict, finding Cross guilty of conspiracy and 23 of the 36 substantive counts, acquitting him on 12 counts, with no verdict on one count, which

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1. Although the offenses were committed, and the indictment was returned in the Tacoma (Southern) Division of the District, the case was transferred sua sponte by the court to the Seattle (Northern) Division shortly after indictment, and all proceedings thereafter were held in the Seattle Division.

was later dismissed.

Appellant contends first that the district court erred in denying his motion for a continuance, based in part on lack of time for adequate preparation.[2]

Between arraignment on May 12, 1982, and June 14, 1982, Cross was represented by Arthur Emery. On June 14, Charles J. Herrmann was retained to replace Emery as counsel. On June 16, Herrmann appeared before the court and sought to be substituted as counsel. The court indicated that it would approve the substitution if a conflict issue, raised

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2. Initially Cross and Satiacum had both filed motions for a continuance, based in part on an anticipated conflict with another case involving Satiacum. At a pretrial conference hearing on June 11, the court learned that Saticum's other case was to be continued, eliminating the anticipated conflict. The court noted that if this case were not tried in July as scheduled, it could not be reached before October.

by the Government, were resolved, provided the trial could proceed as scheduled in July. Herrmann assured the court that he could be prepared for trial as scheduled.[3]

On the morning of trial Herrmann, however, moved for a continuance based on alleged bad faith of the prosecution with respect to providing Jencks and Brady materials[4] and an alleged unfairness in

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3. THE COURT: That's the only problem I have heard so far. You have assured the court you would be ready to go even though it's short notice. That would be the court's major concern.

MR. HERRMANN: As far as the trial is concerned, I guess I would be asking for some time to file motions myself, but as far as the trial is concerned, I have no problem with clearing my calendar and being prepared by the week of the 6th or the 12th of July, but I would be I'm sure asking the court to entertain the motions that I would see fit to bring.

4. Cross argues that the court's major consern of expediency of trial made it impossible for him to receive effective assistance of counsel where there was a rapid barrage of exhibits and "some 375" documents.

the nature of the Federal Rules of Criminal Procedure with respect to the lack of provision for the court ordered depositions of witnesses unwilling to speak with defense counsel. The court denied the motion for continuance but indicated its willingness to provide counsel with additional time to review Jencks and Brady materials during trial if necessary.

Motions for continuances based on lack of preparation are addressed to the sound discretion of the trial court. The standard of review is whether or not the denial was an abuse of that discretion. United States v. Young, 470 F.2d 962, 964 (9 Cir. 1972), cert. denied, 410 U.S. 967 (1973), reh'g. denied, 411 U.S. 940 (1973), cert. denied, 412 U.S. 951 (1973); United States v. Wheeler, 434 F.2d 1195 (9 Cir. 1970). An appellant "assumes a heavy burden" in contending that a continuance was improperly denied, "as the discretion of a

trial judge in the disposition of a motion for a continuance is rightly broad." United States v. Harris, 436 F.2d 775, 776 (9 Cir. 1970).

It is well settled in this circuit that actual prejudice must be shown before the denial of a continuance will be reversed. United States v. Veatch, 674 F.2d 1217, 1226 (9 Cir. 1981), cert. denied, 456 U.S. 946 (1982); United States v. Hernandez, 608 F.2d 741, 746 (9 Cir. 1979). Cross has failed to point to any specific prejudice resulting from the denial of a continuance. Nor does the record show any prejudice as a result of lack of preparation by trial counsel. On the contrary, the record indicates that Cross was effectively represented by counsel throughout the trial.

Nor do we find evidence of bad faith on the part of the Government in responding to Cross' motion for discovery of

Jencks and Brady material.[5] Counsel for Cross claimed that the prosecution had responded to his request for exculpatory information in bad faith by withholding the grand jury testimony of two defense witnesses. Counsel acknowledged, however, that he had interviewed these individuals and had listed them on his defense witness list. The government urged that the fact that these witnesses were known and available to the defense removed any "exculpatory" aspect from the impact of the Brady rule. The trial court reviewed the transcripts of the two witness's grand jury testimony in camera and decided that, based on United States v. Tierney, 424 F.2d 643, 646 (9 Cir.), cert. denied, 400 U.S. 850

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5. The constitutional command of Brady is that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963).

(1970), the Government's position in this case was correct. We agree.

The Jencks Act requires that witness' prior statements in the possession of the Government that relate to the subject matter of their testimony be provided to the defense at the close of witness' direct examination. 18 U.S.C. § 3500(b). All of the Jencks Material was provided in advance of this deadline.

Cross wanted to call the prosecutor as a witness to statements made by Thomas Carpenter. The prosecutor said he was not a witness to the statements and that the statements would be provided to the defense with Carpenter's Jencks material - which in fact, was done. These statements appear to fall within the Jencks Act as witness' prior statements that must be disclosed at the close of direct examination. As the Government notes,

> Brady does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and Brady material, the Jencks Act standards control.

United States v. Jones, 612 F.2d 453, 455 (9 Cir. 1979), cert. denied, 445 U.S. 966 (1980). On these facts, the Jencks standard applies rather than the Brady standard. The Government complied with Jencks.

The motion for a continuance was based in part upon appellant's contention that the federal criminal discovery procedures denied equal protection and due process, since the grand jury affords the prosecution pretrial discovery not available to the defense. As the Supreme Court noted in Weatherford v. Bursey, 429 U.S. 545, 559 (1977), "[t]here is no general constitutional right to discovery in a criminal case...." Moreover, the Federal Rules of Criminal Procedure provide for the taking of depositions only under certain

limited circumstances not urged here. Depositions under Rule 15 are not authorized for discovery purposes. United States v. Rich, 580 F.2d 929, 933-34 (9 Cir.), cert. denied, 439 U.S. 935 (1978). Cross' statement that "[n]umerous commentators have advocated increased pretrial discovery in criminal cases" does not change the rules governing discovery in criminal cases.

Finally, appellant argues that the court erred in refusing to consider and grant his motion for a change of venue. Among the motions filed a few days prior to trial was a motion for a change of venue, accompanied by voluminous newspaper clippings. The court found the motion untimely and declined to consider it.

The trial court's ruling on a change of venue motion will be reversed only for an abuse of discretion. United States v. Flores-Elias, 650 F.2d 1149, 1150 (9 Cir.), cert. denied, 454 U.S. 904 (1981).

Rule 22, Federal Rules of Criminal Procedure, provides:

> A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

Criminal Rule 22 of the Rules of the United States District Court for the Western District of Washington provides:

> A motion for change of venue under Rule 21, Fed. R. Crim. P., shall be made within the time allowed for filing pretrial motions under these rules.

As the Government points out, the time set for filing of pretrial motions was May 26, 1982. That time period was not changed. Appellant did not meet his burden of showing abuse of discretion when the court declined to consider the first motion for change of venue.

After voir dire, Cross again moved for a change of venue, and the court denied the motion on the merits stating:

> I'm going to deny the motion again. If anything, the jury impanelling has shown that the fears are not grounded; that in fact most people are talking about this article, which I don't think in any way prejudicial. I think we filtered out two people who have heard other news media stories other than the ones connected with this case, and even they don't feel that it would affect their hearing the case fairly, and I'm going to deny the motion.[6]

We find no abuse of discretion in the court's denial of the motion for change of venue.[7]

Nor do we find any prejudicial error in the court's instructions or refusal to give offered instructions.

AFFIRMED.

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6. Defendant declined the offer to explore further the jurors' responses by questioning them individually in chambers, except for three jurors, one of whom had seen none of the publicity. Defendant also used four of his ten peremptory challenges to strike jurors who had not seen any publicity and whose only distinguishing feature was having had prior jury service.

7. Moreover, as noted above (note 1), the case had already been transferred *sua sponte* by the court from the Tacoma Division to the Seattle Division.

APPENDIX B.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff,	)	NO. CR82-20TR
v.	)	ORDER DENYING MOTION FOR LEAVE TO FILE MOTIONS
SILAS A. CROSS and ROBERT SATIACUM, Defendants.	)	

THIS MATTER comes before the court on the motion of defendant Silas A. Cross for leave to file pretrial motions. Having considered the motion, together with the affidavit of defense counsel Buckley filed in support thereof, as well as the balance of the file herein, and being fully informed, the court finds and rules as follows:

The motions cut-off date in this matter was May 26, 1982. On June 16, 1982 Mr. Cross lodged an order allowing the substitution of Mr. Herrmann for Mr. Emery

as defense counsel. At a hearing in open court that day, Mr. Herrmann stated that he intended to file several new motions. The court unambiguously indicated that, to be considered, such motions would have to be filed almost immediately.

The instant motion, together with the motions for change of venue, for attorney conducted voir dire, and for discovery, and the voluminous exhibits that accompany them, were not filed until June 28, 1982. Trial in this matter is scheduled to commence on July 6, 1982. These tardy motions are clearly not the sort of expedited motions that the court suggested it might entertain due to the change of counsel. Rather, with trial five court days away, they put the court and the government at an extreme and unwarranted disadvantage.

The motion is DENIED.

IT IS SO ORDERED.

The Clerk of the Court is directed to

forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 29th day of June, 1982.

/s/
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX B.2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff,	
v.	NO. CR82-20T(R)
SILAS A. CROSS,	JUDGMENT AND COMMITMENT
Defendant.	

On this 19th day of November, 1982, came the attorney for the government and the defendant appeared in person and by Charles J. Herrmann, Counsel.

IT IS ADJUDGED that the defendant upon his plea of NOT GUILTY and a verdict of GUILTY has been convicted of the offenses of conspiracy, in violation of Title 18, United States Code, Section 371 as charged in Count I of the Indictment; embezzlement of tribal organization funds as charged in Counts II, III, IV, V, VI, IX, X, XI, XVIII, XXII, XXV, XXVI, XXIX, XXXI, XXXII, XXXVI, XLI, XLIV, and XLV of the Indictment and misapplication

of Indian Self-Determination Act Contractual Funds as charged in Counts XXI, XXXVII, XXXVIII, and XLII of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count I and fined the sum of TEN THOUSAND DOLLARS ($10,000);

IT IS ADJUDGED that on each of Counts, II, III, IV, V, VI, IX, X, XI, XVIII, XXII, XXV, XXVI, XXIX, XXXI, XXXII, XXVI, XII, XLIV, and XLV, that the defendant is hereby committed to the custody of the attorney General or his authorized representative for

imprisonment for a term of TWO (2) YEARS and fined the sum of ONE THOUSAND DOLLARS ($1,000) on each count; said sentences of imprisonment to run consecutively to the sentence on Count I and concurrently with each other;

IT IS ADJDUGED that on Counts XXI, XXXVII, XXXVII, and XLII that the imposition of sentence is hereby suspended and the defendant placed on probation for a period of FIVE (5) YEARS. Such period of probation is to commence upon the defendant's release from prison by United States Parole Commssion and is to be on the following terms and conditions:

1. That he obey all local, state, and federal laws.
2. The he comply with the rules and regulations of the Probation Department.
3. That he make resitution in the sum of Twenty Eight Thousand Six

Hundred Seventy Five Dollars ($28,675);

(a) by payment on the maturity date of January 15, 1983, to the Puyallup Tribe of Indians through the Probation Office, the amount of $17,200, plus any accrued interest presently on deposit in the name of the defendant and the Bureau of Indian Affairs in the Puyallup Valley Bank, Puyallup, Washington, as reflected by certificate number 1014102147 and;

(b) by payment of the balance of the restitution in such amounts and at such time as directed by the Probation Department.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as

the commitment of the defendant.

Presented by: /s/ BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

/s/ DAVID E. WILNER, AUSA
PETER O. MUELLER (for)
Assistant U.S. Attorney

CLERK

APPENDIX B.3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SILAS CROSS, Defendant-Appellant.	NO. 82-1713 DC CR 82-20-1 BJR

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 22, 1983

APPENDIX C

The Jencks Act 18 U.S.C. Section 3500 (as amended 1975)

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United states, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not

relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant

any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;
(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(Added Sept. 2, 1957, P.L. 85-269, 71 Stat. 595; Oct. 15, 1970, P.L. 91-452, Title I, § 102, 84 Stat. 926.)

APPENDIX D

Fed. R. Crim. P. Rule 15 (As amended 1975)

RULE 15. Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion for a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having

custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to deposition testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by agreement not precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(Dec. 26, 1944, eff. Mar. 21, 1946, as amended Apr. 22, 1974, eff. Dec. 1, 1975, Act July 31, 1975, P.C. 94-64, §§ P.L. 94-64, 2, 3(15-19), 89 Stat. 370, 373, eff. Dec. 1, 1975)

APPENDIX E

Fed. R. Crim. P. Rule 16 (as amended 1966 and 1975)

Rule 16. Discovery and Inspection
(a) Disclosure of evidence by the government.
(1) Information subject to disclosure.
(A) Statement of defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated

as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and tangible objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief as the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 USC § 3500.

(3) Grand jury transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of evidence by the defendant.
(1) Information subject to disclosure
(A) Documents and tangible objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of examinations and tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such

request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing duty to disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of discovery.
(1) Protective and modifying orders. Upon a sufficient showing the court may at any time order that the discovery or

inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

e. Alibi witnesses. Discovery of alibi witnesses is governed by Rule 12.1.
(Dec. 26, 1944, eff. Mar. 21, 1946, as amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975,; Act July 31, 1975, P.L. 94-64, §§ 2, 3(20-28), 89 Stat. 370, 374, eff. Dec. 1, 1975; Act Dec. 12, 1975, P.L. 94-149, § 5, 89 Stat 806.)

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. SILAS A. CROSS and ROBERT SATIACUM, Defendants.	NO. CR 82-20TR MOTION FOR CONTINUANCE OF TRIAL AND FILING OF MOTION DATES

Defendant, SILAS CROSS, by his attorney, ARTHUR J. EMERY, JR., hereby moves the court that the trial of the above entitled case, now set for July 6, and the date for filing motions now set for May 26, 1982, be continued on the grounds that the case is complex and the ends of justice require that defendant's counsel be affored time to prepare.

This motion is based on the annexed affidavit of Arthur J. Emery, Jr., all the files and records in the case, and any evidence that may be produced at the hearing.

Dated this 26th day of May, 1982.

/s/
ARTHUR J. EMERY, JR.
Attorney for Silas Cross

STATE OF WASHINGTON)
)ss.
County of Pierce)

ARTHUR J. EMERY, JR., being first duly sworn and upon his oath, deposes and says:

1. He is the attorney for Co-defendant, Silas A. Cross and makes this affidavit in support of defendant's motion to continue the trial date and the date set for filing of motions herein.

2. That your affiant does not have a great deal of experience in the Federal Criminal System.

3. That the case against Defendant Silas Cross is an extremely complex one involving 37 criminal counts.

4. That witnesses for the defense are scattered throughout the country and the situation demands that many of them be

interviewed personally.

5. That Co-defendant, Robert Satiacum has been arraigned on charges which are scheduled to be tried on June 28, 1982, which is one week prior to trial herein. That the first Satiacum trial is estimated to last at least one month.

6. That the AUSA in charge of this case has indicated if the Co-defendant's trials are not separated he would not oppose a continuance.

7. That this case is so unusual and complex due to the nature of the prosecution and the existance of novel questions of fact and law that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits previously established.

FURTHER YOUR AFFIANT SAITH NAUGHT.

/s/
ARTHUR J. EMERY, JR.

SUBSCRIBED AND SWORN to before me this 26th day of May, 1982.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.

APPENDIX G

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THE COURT: OKAY. DOES THAT MEAN YOU GUYS HAVEN'T HAD A CHANCE TO ABSORB THIS KNOWLEDGE AND FIGURE OUT WHAT YOU'RE GOING TO DO?

MR. IMMELT: WELL, REGARDLESS OF WHEN JUDGE McGOVERN'S TRIAL -- THE RICO CASE GOES TO TRIAL, IT WOULD BE MY FEELING THAT IT WOULD BE IMPOSSIBLE FOR US TO PREPARE EVEN FOR A JULY 6TH TRIAL. THE REASON THAT THE RACKETEERING CASE IS BEING CONTINUED IS TO ALLOW US AN APPROPRIATE AMOUNT OF TIME TO PREPARE FOR THAT CASE, AND IF WE'RE GOING TO BE NOW SWITCHING GEARS AND PREPARING FOR THIS CASE TO GO TO TRIAL ON JULY 6TH AND THEN TRYING IT THROUGH FIVE WEEKS OR SIX WEEKS, THEN, OF COURSE, IT'S LIKE YOU CHANGE ONE TO FIX THE OTHER AND --

THE COURT: HOW LONG TO YOU ANTICIPATE THIS CASE IS GOING TO TAKE?

MR. IMMELT: I UNDERSTAND FROM MR. MUELLER THAT HIS CASE, THE GOVERNMENT'S CASE IN CHIEF, WILL TAKE ABOUT THREE WEEKS.

MR. MUELLER: YOUR HONOR, I HAVE MADE A VERY CONSERVATIVE ESTIMATE OF TRIAL IN THIS CASE, IN THAT I OVERESTIMATED, I THINK, THE TIME THAT SHOULD BE TAKEN JUST OUT OF AN ABUNDANCE OF CAUTION. WHAT I HAVE COME UP WITH IS APPROXIMATELY TWELVE TRIAL DAYS FOR THE GOVERNMENT'S CASE, AND IF THE COURT IS SITTING ON A FOUR WEEK SCHEDULE -- A FOUR DAY A WEEK SCHEDULE AS IT OFTEN

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LIVE WITH THAT? I'M JUST TRYING TO GET SOME FEELING IF JUDGE McGOVERN SAYS, NO, I CAN'T GO TWO WEEKS, BECAUSE IT RUNS INTO --

MR. IMMELT: I DON'T HAVE ANY PROBLEM WITH THAT.

MR. EMERY: IF YOU'RE ASKING ME, YOUR HONOR, I FILED A MOTION SEPARATE FROM --

THE COURT: I KNOW. I THINK FOR NOW WE HAVE TO ASSUME THAT YOU'RE GOING TO GO WITH

HIM. SO AT LEAST ASSUME THAT YOU'RE GOING TO GO IN THE CASE WITH MR. SATIACUM.

MR. EMERY: I UNDERSTAND. EVEN GIVEN THAT, I WOULD INDEPENDENTLY, BECAUSE OF 37 COUNTS, 40 GOVERNMENT WITNESSES, LIKE TO HAVE MORE TIME TO PREPARE. I WOULD WANT TO STATE THAT FOR THE RECORD.

THE COURT: BUT YOU HAVE HAD COPIES OF THE DOCUMENTS?

MR. EMERY: I HAVE HAD COPIES OF THE DOCUMENTS.

THE COURT: OKAY. WHY DON'T I CALL -- CAN YOU TRY --

MR. IMMELT: I CAN TRY MR. NEWSUM RIGHT NOW.

MR. MUELLER: UNFORTUNATELY I BELIEVE MR. NEWSUM IS OUT OF TOWN. HIS ASSOCIATE MADE AN APPEARANCE YESTERDAY BEFORE MAGISTRATE SWEIGERT IN CONNECTION WITH HIS DEFENDANT ASKING PERMISSION TO GO OUT OF TOWN FOR THE

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EITHER BE THE 10TH OR THE 17TH, OKAY?

YOU CAN THINK ABOUT IT. IF YOU DECIDE WHERE YOU WANT YOUR LEAD TIME -- IF YOU THINK YOU CAN BE READY ON THE 6TH, I WILL GO WITH YOU THE 6TH.

MR. IMMELT: OKAY.

THE COURT: THEN YOU WILL GET THE EXTRA TIME AT THE END.

MR. IMMELT: AT THE END.

THE COURT: IF YOU WANT TO GO ON THE 12TH, I WILL GO ON THE 12TH, BUT WHAT I DO NEED TO ASK YOU TO DO IS TO MAKE THE DECISION FAIRLY -- LIKE RIGHT AWAY.

MR. IMMELT: WE WILL HAVE IT BY MONDAY AT THE VERY LATEST.

THE COURT: GREAT. WE HAVE OTHER CASES TO WORK AROUND.

MR. IMMELT: SURE.

THE COURT: I'D EITHER BETTER MOVE THEM OR GET WAIVERS OR WHATEVER I NEED TO HAVE DONE.

ANYWAY, JOHN IS GOING TO GET BACK TO

YOU, KIMZEY, ON WHETHER IT'S GOING TO BE THE 10TH OR 17TH. SO MR. KIMZEY WILL CALL YOU LATER.

I WILL ASSUME, COUNSEL, THAT YOU WON'T NEED ME TO GET YOU STIPULATIONS ON DOCUMENTS IN ORDER.

MR. IMMELT: NO.

THE COURT: BECAUSE IF IT'S GOING TO BE A

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BE CONTINUED UNTIL THE FALL, OTHERWISE I THINK THAT THIS WOULD HAVE BEEN MORE EXPEDITIOUSLY TAKEN CARE OF. BUT I AM IN A PECULIAR POSITION RIGHT NOW BECAUSE FROM MY POINT OF VIEW MY CLIENT HAS INFORMED ME THAT MR. HERRMANN WOULD BE MAKING THE DECISIONS FROM HERE ON IN.

THE COURT: IT'S MY UNDERSTANDING THEN, MR. EMERY -- I HAVEN'T HEARD AN ANSWER. THERE IS NOW A DESIRE ON YOUR CLIENT'S PART TO PROCEED WITH A JURY, NOT TO WAIVE A JURY, IS THAT CORRECT?

MR. EMERY: I THINK THAT THAT'S THE BOTTOM LINE, YOUR HONOR. IT'S MORE A QUESTION OF MR. HERRMANN WANTING PERHAPS UNTIL MONDAY TO -- AND I HAVE BEEN RETAINED TO BRING HIM UP TO SPEED AS TO WHERE I AM IN THE CASE, SO THAT HE MIGHT BE ABLE TO MAKE AN INFORMED DECISION FROM HIS PERSPECTIVE.

THE COURT: WELL, THE PROBLEM IS, COUNSEL, THAT -- I THINK I'VE INDICATED TO YOU THAT FROM EVERYTHING I HAVE LEARNED ABOUT THE CASE I DO NOT SEE A NEED FOR A CONTINUANCE IN THIS CASE, I THINK THIS CASE SHOULD GO, AND I DON'T THINK IT IS A CASE THAT IS EITHER THAT COMPLICATED OR THAT LENGTHY THAT IT SHOULD REQUIRE PUTTING IT OVER UNTIL WHAT WOULD AMOUNT TO SEPTEMBER OR OCTOBER OR MAYBE EVEN NOVEMBER, AND THE COURT DID EXPRESS A WILLINGNESS TO ADJUST THE COURT DATE -- AT THAT TIME I BELIEVE THAT WE HAD A COURT TRIAL -- OF PUTTING THIS

MATTER OVER UNTIL THE 12TH. IT WOULDN'T

POSE SERIOUS PROBLEMS WITH JUDGE McGOVERN'S CASE BECAUSE IT'S A COURT-TRIED CASE, WE CAN MOVE IT RATHER QUICKLY. IF IT MEANT GOING LATE, SAVING SOME TIME BY PUTTING IN LONGER HOURS, IT WOULD BE AN EASIER THING TO DO THAN WITH A JURY TRIAL.

I SHOULD INDICATE THAT IT'S COME TO MY ATTENTION THAT MR. SATIACUM AND HIS ATTORNEY HAVE EXPRESSED A PREFERENCE FOR THE JULY 12TH DATE, BUT IF -- I DON'T WANT TO LEAD ANYBODY ASTRAY HERE. IF WE ARE GOING WITH A JURY TRIAL, I AM CONCERNED ABOUT THE JULY 12TH DATE. I AM MUCH MORE LOATHE TO PUT IT OVER THAT WEEK BECAUSE WE HAVE -- I SUPPOSE WE WOULD STILL FINISH IN PLENTY OF TIME, I THINK, EVEN WITH A JURY, AND WE WOULD STILL HAVE THE OPTION OF ASKING THEM TO STAY A LITTLE LATER AND COME IN A LITTLE EARLIER, BUT THINGS TAKE LONGER WITH A JURY. THERE'S JUST NO DOUBT ABOUT IT.

SO I'M NOT GOING TO GIVE YOU ANY RULING TODAY ON THE DATE OF THE TRIAL SINCE WE

DON'T KNOW WHETHER IT IS GOING TO BE JURY OR NON-JURY.

NOW, WHY IS IT GOING TO TAKE UNTIL MONDAY TO FIND OUT WHETHER YOU WANT A JURY OR NOT?

MR. EMERY: WELL, THE CASE INVOLVES 37 COUNTS, AS THE COURT IS AWARE. THE GOVERNMENT HAS BEEN WORKING UP THE CASE FOR OVER A YEAR. THEY'VE GOT SOMETHING LIKE

40 WITNESSES SUBPOENAED. I DON'T NECESSARILY SHARE THE COURT'S OPINION THAT IT'S THAT SIMPLE OF A CASE. TO ME IT ISN'T AND I'VE SPENT HOURS WITH MY CLIENT GOING THROUGH THE COUNTS OF THE INDICTMENT, THE VARIOUS EXHIBITS THAT THE GOVERNMENT HAS PROVIDED US WITH, AS WELL AS EXHIBITS THAT MY CLIENT HAS PROVIDED ME WITH. I HAVE ALSO MADE CONTACT WITH WHAT I PERCEIVE TO BE SOME OF THE WITNESSES, AND I DON'T FEEL THAT I HAVE SCRATCHED THE SURFACE YET, ALTHOUGH I DO FEEL THAT I HAVE BEEN DILIGENT, YOUR

HONOR.

THERE'S A LOT OF INEXPERIENCE ON MY PART AND I UNDERSTAND THAT THAT'S MY PROBLEM, BUT -- AND IT'S AN EXPLANATION -- THAT'S A REASON RATHER THAN AN EXCUSE.

THE COURT: OKAY.

MR. HERRMANN: MAY I BE ALLOWED TO ADDRESS THE COURT, YOUR HONOR?

THE COURT: SURELY.

MR. HERRMANN: YOUR HONOR, I'M CHARLES HERRMANN. I PRACTICE IN TACOMA. I JUST ACTUALLY WAS RETAINED AND MADE AN AGREEMENT TO REPRESENT SILAS CROSS ON MONDAY.

I WAS IN THE STATE SUPREME COURT YESTERDAY AND, THEREFORE, UNABLE TO DEVOTE MY ENERGIES YESTERDAY. SO I HAVE SPENT ALL MORNING WITH MR. EMERY TRYING TO BRIEF MYSELF, READING GRAND JURY TESTIMONY, AND THE THINGS THAT

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ARE AVAILABLE TO ME.

IT IS JUST MY POSITION AT THIS POINT

THAT I HAVE HAD A TOTAL OF MAYBE SIX OR SEVEN HOURS, AND I THINK THE MATTER OF WHETHER A CASE SHOULD BE TRIED TO THE COURT OR TRIED TO THE JURY IS A SUBSTANTIAL QUESTION. I DON'T FEEL THAT I HAVE HAD SUFFICIENT TIME TO GIVE MY PROFESSIONAL ADVICE TO MY CLIENT AS TO WHETHER THE JURY SHOULD BE WAIVED. IT MAY PROVE VERY WELL THAT WE WOULD BE WILLING TO WAIVE THE JURY IN THIS MATTER. I JUST AM IN A POSITION WHERE I DON'T KNOW AND I DON'T FEEL THAT I CAN PROPERLY --

THE COURT: AND I WOULDN'T BE SATISFIED, QUITE FRANKLY, MR. HERRMANN, IF YOU OR YOUR CLIENT AT THIS POINT DID REACH A DECISION. I THINK IT TAKES TIME. IT'S A VERY SERIOUS STEP AND CERTAINLY SHOULD'T BE MADE WITHOUT ADVICE OF COUNSEL, AND ADVICE OF FULLY INFORMED COUNSEL.

MR. HERRMANN: THANK YOU, YOUR HONOR. I DO BELIEVE THAT I HAVE -- I DO HAVE OTHER ATTORNEYS IN MY OFFICE -- THE ABILITY TO

MORE OR LESS CLEAR MY DESK AT THIS POINT, AND I DO FEEL THAT WE CAN REACH A DECISION BY MONDAY, IF I JUST AM ALLOWED TWO OR THREE MORE DAYS OF CONTINUOUS STUDY AND SOME WORK WITH MY CLIENT ON IT; THAT WE COULD INFORM THE COURT BY MONDAY AS TO OUR POSITION AS TO WHETHER WE WANT A JURY TRIAL OR NOT, IF THAT WOULD BE

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ACCEPTABLE TO THE COURT

THE COURT: WELL, I'D PREFER IT BY FRIDAY IF I COULD HAVE IT BECAUSE I THINK IT WOULD HELP THE COURT IN ASSESSING EXACTLY --

MR. HERRMANN: WHEN YOU WANT THE TRIAL DATE.

THE COURT: YES. IT WOULD HELP YOUR CO-COUNSEL, WHO I THINK IS PROBABLY -- ACTUALLY, I KEEP THINKING MORE OF HIM THAN OF THE COURT. I THINK YOUR CO-COUNSEL PROBABLY WANTS TO KNOW HOW HE'S GOING TO BE TRYING THE CASE TO SOME EXTENT, TOO.

MR. HERRMANN: CERTAINLY. COULD WE HAVE

UNTIL THE CLOSE OF THE DAY ON FRIDAY?

THE COURT: SURE, ABSOLUTELY. DO YOU THINK THAT WOULD BE REASONABLE, COUNSEL?

MR. HERRMANN: YES, YOUR HONOR. I'LL GET YOU OUR POSITION ON THAT BY --

THE COURT: IF YOU COULD LET ME KNOW THEN AND ABOVE ALL LET YOUR CO-COUNSEL KNOW THEN, THEN AT LEAST I THINK I CAN START THINKING MORE ALONG THE LINES OF DO WE WANT TO MOVE THE TRIAL DATE UP, HOW THE TRIAL LOOKS IN TERMS OF HOW LONG IT'S ACTUALLY GOING TO TAKE, AND WE WILL GO WITH THE 6TH OR THE 12TH, OR WHAT THE STORY WILL BE.

MR. HERRMANN: WE CAN HAVE AN ANSWER BY FRIDAY AFTERNOON.

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UNDERSTAND NOW THAT YOU HAVE SIGNED THE SUBSTITUTION?

THE COURT: I AM ABOUT TO DO THAT, MR. HERRMANN.

COUNSEL, I SUPPOSE AS LONG AS WE ARE IN OPEN COURT WE CAN GO AHEAD WITH OUR PRETRIAL

CONFERENCE OUT HERE. YOU ALL LOOK VERY COMFORTABLE AND IT'S A LOT COOLER IN HERE THAN IT IS IN MY CHAMBERS.

MR. MUELLER: YOUR HONOR, ONE THING THAT I MIGHT POINT OUT IS THERE HAVE BEEN SOME MOTIONS IN THIS CASE RELATING TO PRETRIAL PUBLICITY. THERE HAVE BEEN THINGS OF THAT NATURE. THERE ARE MEMBERS OF THE PRESS IN THE COURTROOM, AND PRETRIAL CONFERENCES ARE NOT NORMALLY CONDUCTED IN OPEN COURT. SOMETIMES THEY ARE, BUT IF THE COURT SEES ANY PROBLEM IN THAT NATURE, GIVEN THE ISSUES THAT WERE RAISED ALREADY, I JUST WANTED TO BRING THAT TO THE COURT'S ATTENTION.

THE COURT: OH, I DON'T SEE ANY PROBLEM. IN FACT, NOW THAT I KNOW THAT MEMBERS OF THE PRESS ARE PRESENT, IT'S CERTAINLY MORE CONVENIENT TO STAY IN OPEN COURT THAN TO GO INTO CHAMBERS. NO, I DON'T SEE ANY PROBLEM WITH THAT. THERE ARE A COUPLE OF MATTERS I WANTED TO DISCUSS WITH COUNSEL.

FIRST OF ALL, HAVE YOU FILED YOUR VOIR DIRE QUESTIONS, YOUR PROPOSED VOIR DIRE QUESTIONS?

MR. HERRMANN: I HAVE, YOUR HONOR.

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MR. MUELLER: YOUR HONOR, COUNSEL HAVE BOTH INDICATED TO ME IN PRELIMINARY STATES AFTER HAVING RECEIVED THE DOCUMENTS THAT THEY DON'T ANTICIPATE OR DIDN'T ANTICIPATE OBJECTIONS TO AUTHENTICITY. ON THE OTHER HAND, THEY WERE RELUCTANT AT THAT STAGE, HAVING NOT FULLY EXAMINED THE DOCUMENTS APPARENTLY, TO COMMIT THEMSELVES TO THAT. I THINK IT WOULD BE APPROPRIATE TO INQUIRE, BECAUSE I HAVE HALF A DOZEN WITNESSES FROM PLACES LIKE AIRLINES AND HOTELS ON CALL TO FLY IN FROM OTHER AREAS, AND THERE ARE VOLUMINOUS DOCUMENTS, PARTICULARLY THAT IS INVOLVED WITH THE TRIBAL RECORDS, THAT WE COULD SHORTEN UP THE PRESENTATION OF SUBSTANTIALLY IF THAT'S NOT GOING TO BE AN ISSUE.

SO I WOULD INQUIRE OF COUNSEL THROUGH THE COURT WHETHER THEY'RE PREPARED NOW TO INDICATE WHETHER THERE IS ANY AUTHENTICITY OBJECTIONS TO THE DOCUMENTS THAT I'VE PROVIDED THEM.

MR. HERRMANN: I'M NOT PREPARED TO STIPULATE TO THE AUTHENTICITY OF ANYTHING AT THIS POINT IN TIME. I HAVE INDICATED TO COUNSEL AND IT WOULD BE MY FEELINGS NOT TO RAISE FRIVOLOUS OBJECTIONS WHEN I HAVE NO GROUNDS TO QUESTION THE AUTHENTICITY OF ANY PARTICULAR DOCUMENT, AND I'M NOT INTERESTED IN DELAYING THIS TRIAL OR MAKING THINGS GO FURTHER.

THE GOVERNMENT HAS HAD A YEAR HERE TO PREPARE THEIR

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CASE. WE'VE HAD A MATTER OF A FEW WEEKS AND, FRANKLY, I HAVE TO DIRECT MY ENERGIES IN A WAY WHICH I FEEL ARE GOING TO BEST SERVE MY DEFENDANT, AND I HAVE NOT HAD THE TIME OR THE OPPORTUNITY OR EVEN THE

INCLINATION AT THIS POINT IN TIME TO SIT DOWN AND GO THROUGH THIS SOME SEVERAL HUNDREDS OF PAGES OF DOCUMENTS.

THE COURT: LET ME SAY THIS, MR. HERRMANN. IN CASE YOU HAVE ANY DOUBTS AS TO WHAT THE COURT'S PROCEDURE IS GOING TO BE, IF YOU THINK THAT THE FIRST TIME YOU'RE GOING TO HAVE AN OCCASION TO GO THROUGH, READ THE DOCUMENT AND DETERMINE WHETHER IT'S WHAT YOU'RE NOT GOING TO OBJECT TO OR GOING TO OBJECT TO IS GOING TO BE DURING TRIAL, THE COURT WILL NOT SIT HERE WHILE COUNSEL DOES THAT FOR THE FIRST TIME DURING TRIAL. SO AT SOME POINT BEFORE NEXT TUESDAY YOU'RE GOING TO HAVE TO FAMILIARIZE YOURSELF WITH THOSE DOCUMENTS. IT'S NOT GOING TO BE THE TIME TO FAMILIARIZE YOURSELF WITH THEM WHEN THEY'RE OFFERED IN EVIDENCE.

SO, I THINK THAT -- I APPRECIATE YOUR PROBLEM, BUT I ALSO THINK THAT YOU DO HAVE SOME ASSISTANCE IN THIS MATTER THROUGH CO-COUNSEL, AND IF WHAT YOU'RE TELLING ME IS

YOU DON'T WANT TO HOLD UP THE TRIAL, MY QUESTION IS WHY ARE WE BRINGING IN WITNESSES TO AUTHENTICATE DOCUMENTS IF THERE'S REALLY NO ISSUE ABOUT THEM? SURELY THE TRIBAL DOCUMENTS THEMSELVES WE CAN DISPENSE WITH. RT 7/2/82 p 27

MR. HERRMANN: IT'S MY UNDERSTANDING THAT A GREAT MANY OF THOSE ARE IN FACT FORGERIES.

THE COURT: WELL, WHICH ONES? DO YOU KNOW NOW WHICH ONES YOU'RE GOING TO OBJECT TO?

MR. HERRMANN: I AM AWARE OF A COUPLE OF RESOLUTIONS THAT ARE FORGERIES. IT'S ALSO MY UNDERSTANDING THAT SIGNATURES ON THE BACK OF SOME CHECKS TO PETE AZURE, FOR INSTANCE, ARE FORGERIES AND I HAVE ONLY AT THIS POINT BITS AND PIECES OF WHAT WE FEEL AND THERE IS A SUBSTANTIAL LIKELIHOOD THAT THEY ARE IN FACT FORGERIES.

I ONLY HAVE SO MANY HOURS IN THE DAY. I HAVE HAD THREE LAWYERS WORKING FULL TIME ON

THIS CASE IN MY OFFICE WITH ME. I KNOW THE COURT INDICATED THAT ONE OF THE REASOS YOU WOULDN'T CONSIDER OUR MOTION FOR CHANGE OF VENUE WAS BECAUSE OF THE VOLUMINOUS DOCUMENTS WITH ONLY FIVE WORKING DAYS LEFT.

WE ARE NOW GOING TO BE DUMPED WITH HUNDREDS OF PAGES WITH EIGHT -- OR FIVE OR SIX HOURS OF WORKING -- NORMAL WORKING TIME LEFT. WE ARE GOING TO HAVE TO WORK THROUGH THE FOURTH OF JULY WEEKEND TO BE PREPARED ON TUESDAY. I CAN ONLY DO WHAT I CAN DO AND I CAN ASSURE THE COURT THAT WE ARE WORKING DILIGENTLY, THAT I AM WORKING DILIGENTLY AND I HAVE CUT LOOSE TO WORK ON THIS CASE JUST FULL TIME AND WE'RE PUTTING IN SOMEWHERE IN THE

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NEIGHBORHOOD OF 12 TO 14 HOURS A DAY ON IT AND I HAVE ASSIGNED AT LEAST THREE OTHER LAWYERS IN THE OFFICE TO ASSIST ME WITH IT, AND THAT I'M BEING AS DILIGENT AS I POSSIBLY CAN BE, BUT I JUST DON'T SEE HOW I CAN SIT

HERE AND SAY TO THE COURT OR TO COUNSEL -- AND MY OBLIGATION TO MY CLIENT, OF COURSE, IS PARAMOUNT TO MY OBLIGATION TO OPPOSING COUNSEL -- THAT I'M GOING TO STIPULATE TO DOCUMENTS THAT WE HAVEN'T ACTUALLY HAD AN EFFECTIVE CHANCE TO REVIEW.

THE COURT: ALL I'M URGING YOU TO DO, COUNSEL, IS BY ALL MEANS GET YOUR REVIEW DONE BEFORE WE START THE TRIAL, BECAUSE I THINK IT'S GOING TO HOLD MATTERS UP TREMENDOUSLY IF YOUR FIRST REVIEW TAKES PLACE WHEN THE DOCUMENT IS OFFERED IN EVIDENCE. I AM SURE YOU DON'T WANT TO DO THAT EITHER.

MR. HERRMANN: I FULLY INTEND, YOUR HONOR, TO HAVE THE REVIEW OF THE GOVERNMENT'S EXHIBITS COMPLETED BY TUESDAY MORNING AND I FULLY INTEND TO SPEND ALL THREE DAYS OF THE WEEKEND WORKING FULL TIME ON THIS CASE AND IT'S MY INTENTION TO REVIEW THAT, AND I ASSURE THE COURT THAT I'M IN GOOD FAITH NOT GOING TO COME IN HERE AND

START MAKING A BUNCH OF FRIVOLOUS OBJECTIONS ON AUTHENTICITY WHERE I HAVE NO REASONABLE CAUSE AT ALL TO BELIEVE OR QUESTION THE AUTHENTICITY, AND I ASSURE THE COURT OF THAT.

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PLEASE. I WOULD LIKE TO POINT OUT THAT IN THIS CASE, BECAUSE I KNEW THAT THERE WERE LARGE NUMBERS OF DOCUMENTS AND BECAUSE I, BASED ON DISCUSSIONS WITH COUNSEL, DIDN'T ANTICIPATE THERE WERE GOING TO BE SIGNIFICANT AUTHENTICITY PROBLEMS, THE DOCUMENTS WERE NOT ONLY TURNED OVER AT A VERY EARLY DATE, BUT THEY WERE TURNED OVER EACH IN ITS OWN FILE, EACH WITH ITS OWN EXHIBIT NUMBER, CHRONOLOGICALLY MARKED, WITH AN EXHIBIT TAG, SO THAT IT WOULD FACILITATE COUNSEL'S REVIEW OF THE DOCUMENTS.

I DON'T QUIBBLE WITH MR. HERRMANN'S JUDGMENT ABOUT HOW HE'S GOING TO SPEND HIS TIME IN PREPARING HIS CASE, BUT AS A PREFACE TO THAT, IT'S FAIRLY EASY IF THERE ARE CLAIMS THAT CERTAIN OF THESE DOCUMENTS ARE

FORGERIES AND THERE'S GOING TO BE A REAL CONTEST OVER THEIR AUTHENTICITY, TO INDICATE TO ME WHICH ONES THEY ARE, SO IF I THINK THEY'RE AUTHENTIC, I CAN GET THE APPROPRIATE WITNESS AND MAKE SURE I HAVE THEM.

THE COURT: IT'S MY UNDERSTANDING MR. HERRMANN IS GOING TO DO THAT TO THE BEST OF HIS ABILITY BY MONDAY AFTERNOON. IS THAT CORRECT, MR. HERRMANN?

MR. HERRMANN: THAT'S CORRECT, YOUR HONOR.

THE COURT: MAYBE BY TUESDAY --

MR. HERRMANN: I WOULD POINT OUT THAT I'M JUST A LITTLE BIT LIMITED BECAUSE, AGAIN, THE STAR WITNESS HERE, THOMAS CARPENTER, WE HAVE ATTEMPTED TO CONTACT HIM

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AND HE HAS REFUSED TO TALK TO US, SO WE'RE COMPLETELY IN THE DARK AS TO EXACTLY WHAT MR. CARPENTER HAS TO SAY OR DOESN'T HAVE TO SAY, AND ALSO MY UNDERSTANDING IS THAT THE DOCUMENTS THAT I CAN IDENTIFY AS FORGERIES

WERE IN FACT FORGED BY HIM, AND IT PUTS ME -- EVEN IF I WERE TO STIPULATE TO THE AUTHENTICITY OF SOMETHING, IF I FIND WHEN WE GET TO THE TESTIMONY OF HIS AND -- THAT SORT OF THING THE NIGHT BEFORE HE IS SUPPOSED TO TESTIFY, FIND THAT THERE IS EVIDENCE IN THERE THAT WOULD LEAD ME TO BELIEVE THAT OTHER DOCUMENTS HAVE BEEN FORGED OR THAT THERE IS A QUESTION OF AUTHENTICITY AS FAR AS THOSE DOCUMENTS ARE CONCERNED, I HAVE GOT TO BE ABLE TO RESERVE THAT RIGHT. BECAUSE I'M IN THE DARK COMPLETELY AS TO WHAT THIS MAN ACTUALLY SAYS.

THE COURT: I THINK YOU'RE RIGHT. WHAT I DETECT FROM MR. MUELLER, AND THE COURT KNOWS PROBABLY LESS ABOUT THE CASE THAN ANY OF YOU HERE, AT LEAST AT THIS POINT, I DETECT THERE ARE BIG FILES OF DOCUMENTS THAT PROBABLY AREN'T EVEN OPEN TO THAT QUESTION.

MR. HERRMANN: I THINK THAT THAT'S PROBABLY TRUE, TOO, AND I HAVE ALREADY ASSURED MR. MUELLER AND THE COURT THAT I

WILL DO MY VERY BEST EFFORT TO HAVE ALL OF THAT STIPULATED TO COME MORNING OF TRIAL OR MONDAY AFTERNOON, IF HE HAS A NUMBER FOR ME.

THE COURT: THE REASON FOR MY ASKING ABOUT THE

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I ALSO WOULD LIKE TO MAKE A MOTION AT THIS TIME FOR A CONTINUANCE. IT IS OUR POSITION THAT FOR THIS TRIAL TO COMMENCE AT THIS TIME WOULD BE TO EFFECTIVELY DENY MY CLIENT EQUAL PROTECTION OF THE LAW AND DUE PROCESS. THIS IS BASED PRIMARILY ON TWO ARGUMENTS; ONE IS INADEQUATE TIME FOR PREPARATION. I HAVE COME INTO THIS CASE ON JUNE 16TH. I HAVE BEEN DILIGENT; I HAVE PERSONALLY PUT IN OVER TWO HUNDRED HOURS OF WORK BETWEEN THE 16TH AND THIS DATE. I HAVE ALSO HAD OTHER LAWYERS ON MY STAFF WORKING ON IT, BUT WITH THE SEVERAL HUNDRED PAGES OF DOCUMENTS THAT WERE DROPPED ON US ON FRIDAY, IT IS JUST ALMOST IMPOSSIBLE FOR US TO HAVE OUR SIDE COMPLETELY PREPARED HERE.

BUT IT GOES BEYOND THE FACT -- AND I DO WANT TO MAKE THIS AT LEAST FOR THE RECORD. I BELIEVE THAT THE FEDERAL RULES OF CIVIL PROCEDURE IN CRIMINAL CASES ARE IN FACT A DENIAL OF EQUAL PROTECTION AND DUE PROCESS TO THE DEFENDANT. I BELIEVE IT'S THE LAST VESTIGE OF AN ARCHAIC DINOSAUR THAT IS NO LONGER STOOD FOR IN THE FEDERAL CIVIL SYSTEM, IN THE STATE CIVIL SYSTEMS AND EVEN IN THE STATE CRIMINAL SYSTEMS.

I WOULD POINT OUT IN SUPPORT OF THIS THAT WE DO HAVE THE ABILITY, REGARDLESS OF HOW MUCH TIME WE HAVE TO PREPARE, TO ACTUALLY MAKE DISCOVERY AND YET THE GOVERNMENT IS AN ENTIRELY FAVORED PARTY. THEY HAVE THE

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RIGHT TO SUBPOENA PEOPLE OUT OF THEIR HOMES, TO BRING THEM IN IN FRONT OF THE GRAND JURY WITHOUT THE AID OR ASSISTANCE OF COUNSEL IN THE ROOM, TO GET ALL OF THE DISCOVERY THEY WANT, YET WE DO NOT HAVE THE SAME RIGHT.

IN STATE COURTS, WHEN AN INDIVIDUAL WITNESS WILL NOT SPEAK WITH DEFENSE COUNSEL, YOU HAVE THE RIGHT THEN TO APPLY TO THE COURT FOR THE TAKING OF DEPOSITIONS, AND AT THIS TIME AS PART OF MY MOTION FOR A CONTINUANCE I'M ASKING THAT THE COURT ISSUE AN ORDER ALLOWING ME TO TAKE THE DEPOSITONS OF PETER AZURE ESQUIRO AND THOMAS CARPENTER.

I REALIZE THAT THERE IS NO PROVISION IN THE RULES FOR DOING THAT, BUT I THINK THAT THE SUPREME COURT OF THE UNITED STATES IS EVENTUALLY GOING TO HAVE TO TAKE APART THE CRIMINAL RULES OF PROCEDURE HERE, BECAUSE IT DOES ALLOW ONE SIDE TO COME IN HERE WITH A YEAR OF PREPARATION, ABSOLUTE SUBPOENA POWERS, CAN TALK TO ALL THE WITNESSES THEY WANT, IN FACT MAKE THEM TALK, AND YET WE DON'T HAVE THE SAME OPPORTUNITY AT ALL AND WE'RE DENIED -- AND I WANT TO PUT ON THE RECORD THAT WE HAVE CONTACTED MR. CARPENTER'S COUNSEL AND THAT SHE HAS INFORMED US THAT MR. CARPENTER WILL NOT

SPEAK TO US.

WE MADE ARRANGEMENTS TO TALK TO MR. AZURE AND HE AGREED TO MEET WITH US. MY CLIENT AND I, MR. CROSS, GOT ON AN AIRPLANE, WENT CLEAR UP TO SITKA, ALASKA. WHEN WE

ARRIVED THERE, WE WERE THEN INFORMED THAT MR. AZURE WAS INDEED REPRESENTED BY COUNSEL IN THIS MATTER AND THAT HE WAS NOT GOING TO SPEAK TO US AND WE HAVE HAD NO OPPORTUNITY TO TALK WITH HIM.

SO THE CONDITIONS, IF THIS WERE ANALOGOUS TO STATE COURT, HAVE BEEN SET. WE HAVE ATTEMPTED TO CONTACT THESE TWO INDIVIDUALS AND WE HAVE BEEN REFUSED ANY MEETING OR ANY INTERROGATION OF THEM, PERIOD.

I WOULD ALSO LIKE TO POINT OUT THAT THE GOVERNMENT PROVIDED US WITH SOME OF THE JENCKS MATERIAL AND SOME OF THE RESPONSE TO OUR REQUESTS UNDER THE BRADY RULE, AND I DO NOT THINK THAT THAT RESPONSE HAS BEEN IN GOOD FAITH. I THINK, FIRST OF ALL, HE HAS

INFORMED THE COURT THAT HE IS WITHHOLDING SOME OF THE JENCKS MATERIALS ON SOME OF THE KEY WITNESSES, INCLUDING MR. CARPENTER. AFTER SOME 37 HOURS OF OVERTIME OVER THE FOURTH OF JULY WEEKEND, I HAD DROPPED ON ME AT 6:30 LAST NIGHT AT MY OFFICE ANOTHER COUPLE HUNDRED -- A HUNDRED OR SO PAGES OF WHAT IS NOW GOING TO -- THE PETER ASURE GRAND JURY TESTIMONY. THIS HAS BEEN EXTREMELY PREJUDICIAL TO ME TO HAVE TO FIGHT THIS KIND OF THING COMING INTO THIS COURT.

I ALSO WOULD POINT OUT -- AND I HAVE PROVIDED COPIES OF EXHIBITS TO THE COURT -- WHICH IS THE PROSECUTER'S BRADY RESPONSE, WHICH IS IN ESSENCE A COPY OF THE PLEA BARGAINING AGREEMENT AND THE GOVERNMENT'S

RT 7/6/82 Vol A-1 p. 6

MEMORANDUM ON SENTENCING, AND I AM AWARE THAT THE PROSECUTOR HAS FURTHER EXCULPATORY INFORMATION THAT HE HAS NOT PROVIDED US, AND I PROVIDED YOU WITH A COPY OF SEVERAL AFFIDAVITS AND EXHIBITS THAT WERE GIVEN BY

MY CLIENT TO THE FBI IN SUPPORT OF HIS POSITION WHEN THE INVESTIGATION WAS BEING CARRIED ON; NONE OF THOSE MATERIALS WERE PROVIDED BACK TO ME, AND WE NO LONGER HAVE COPIES OF SOME OF IT, IN RESPONSE TO MY BRADY REQUEST.

I WOULD ALSO UNDERSTAND THAT A MR. ZDERIC AND A MR. BRAME BOTH TESTIFIED BEFORE THE GRAND JURY, THEN AND THERE GAVE INFORMATION AND TESTIMONY TO THE PROSECUTOR'S OFFICE THAT IS EXTREMELY EXCULPATORY IN NATURE. NOW, I AM AWARE OF THAT TESTIMONY AND I HAVE BEEN ABLE TO SPEAK WITH THOSE INDIVIDUALS, BUT IT CERTAINLY SHOWS THAT THE PROSECUTOR HAS NOT PROVIDED ME WITH THE EXCULPATORY EVIDENCE THAT HE HAS IN HIS POSSESSION.

I WOULD FURTHER POINT OUT THAT IN THE GOVERNMENT'S MEMORANDUM ON SENTENCING, WHICH I PROVIDED TO THE COURT, MR. MUELLER SIGNED A DOCUMENT THAT SAYS THAT THE GOVERNMENT HAS STRONG EVIDENCE WHICH TENDED TO SHOW THAT

MR. CARPENTER HAD BEEN MAKING FALSE STATEMENTS TO THEM DOWN THERE, YET NOTHING OF THAT KIND IS FORTHCOMING IN THEIR RESPONSE TO THE BRADY MATERIAL.

THE COURT HAS INDICATED TO ME THAT YOU'RE NOT GOING TO ALLOW ME TO CALL MR. MUELLER AS A WITNESS IN THIS

RT 7/6/82 Vol. A-1 p. 7

MATTER. I HAVE REQUESTED UNDER THE ONLY MEANS AVAILABLE TO ME UNDER THE RULES, UNDER THE BRADY CASE, FOR ALL EXCULPATORY INFORMATION, AND YET NOTHING HAS BEEN PROVIDED TO ME WHATSOEVER THAT WOULD SHOW OR DEMONSTRATE WHAT EVIDENCE HE HAS THAT TENDS TO SHOW THAT CARPENTER WAS GIVING FALSE STATEMENTS TO THE AUTHORITIES.

SO, BEYOND THE MOTION TO SEVER, I AM MOVING FOR A CONTINUANCE OF THIS CASE AT THIS TIME FOR TWO REASONS: BASICALLY THAT I HAVE HAD INADEQUATE TIME TO PREPARE THE DEFENSE OF MR. CROSS, AND THAT I ACTUALLY HAVE THE INABILITY TO PREPARE BECAUSE OF THE

RULES OF PROCEDURE AND THE BAD FAITH RESPONSE OF THE PROSECUTOR TO MY JENCKS AND BRADY REQUESTS, AND I DO WANT TO TAKE THE DEPOSITIONS OF -- AND PART OF MY MOTION IS TO TAKE THE DEPOSITIONS OF THOMAS CARPENTER AND PETER AZURE.

THIRD, I HAVE A MOTION IN LIMINE, A COPY OF WHICH I THINK HAS BEEN PROVIDED TO THE COURT. IN READING THE GRAND JURY TESTIMONY THAT HAS BEEN MADE AVAILABLE TO ME, IT'S OBVIOUS TO ME THAT THE PROSECUTOR INTENDS TO MAKE A SUBSTANTIAL ISSUE OUT OF THE FACT THAT AN INVESTIGATOR HIRED BY THE TRIBE, MR. J. BENEDICT ZDERIC, WAS DISBARRED FROM THE PRACTICE OF LAW IN THE STATE OF WASHINGTON. I HAVE PROVIDED YOU WITH A COPY OF THE OPINION DISBARRING MR. ZDERIC , AND A CLOSE READING OF THAT WILL REVEAL THAT THERE WAS NO DISHONESTY INVOLVED. IT WAS RATHER GROSS

RT 7/6/82 Vol A-1 p. 10

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU. MR. MUELLER, DO

YOU WANT TO RESPND TO SOME OF THESE? I WOULD LIKE TO HEAR FROM YOU ON -- I WILL TELL YOU RIGHT NOW THAT THE COURT IS NOT GOING TO ENTERTAIN THE MOTION TO SEVER ON THE GROUNDS -- THE FACT THAT WE ARE PROCEEDING SIMULTANEOUSLY WITH JURY AND NON-JURY. I DO RECOGNIZE THERE MAY BE SOMEWHAT DIFFERENT PROBLEMS THAT ARISE THAN IN THE ORDINARY CASE. WE ARE ALL ALERTED TO IT, WE WILL ALL BE SENSITIVE TO IT, AND WE WILL PROCEED ACCORDINGLY. I DO NOT SEE ANY OF THE PROBLEMS AS INSURMOUNTABLE OR PROBLEMS THAT WOULD IN ANY WAY JEOPARDIZE THE FAIRNESS OF EITHER TRIAL OR EITHER DEFENDANT. THE FACT THAT THERE ARE DIFFERENT TRIERS OF FACT HAPPENS IN CRIMINAL CASES AND WE WILL WORK THE PROBLEMS OUT AS WE ARRIVE AT THEM.

I GUESS WHAT I'M -- I WOULD LIKE TO HEAR YOUR RESPONSE ON THE DEPOSITIONS, MR. MUELLER, AND WHAT I'M MOST CONCERNED ABOUT IS THE ALLEGATIONS THAT THERE IS BRADY

MATERIAL THAT HAS NOT BEEN FURNISHED. AS FAR AS THE FACT THAT THE BRADY MATERIAL MAY BE VOLUMINOUS IN NATURE, THE COURT WILL NOT GRANT A CONTINUANCE ON THOSE GROUNDS. I WILL, HOWEVER, ENTERTAIN ANY MOTIONS IN THE COURSE OF TRIAL, FOR INSTANCE -- I DON'T KNOW IF ANY OF THE WITNESSES FOR WHOM YOU FURNISHED THE MATERIALS LAST NIGHT ARE BEING CALLED TODAY. IF THEY ARE, I AM GOING TO

RT 7/6/82 Vol. A-1 p. 33

CROSS-EXAMINATION OF THE WITNESS, WHICH I THINK WOULD PROBABLY BE ADEQUATE TIME.

IF THERE ARE NO FURTHER PROBLEMS. I WOULD LIKE TO GET THE JURY UP HERE.

MR. HERRMANN: YOUR HONOR, I DON'T THINK YOU -- EXCUSE ME -- SPECIFICALLY RULED ON MY MOTION FOR A CONTINUANCE OR MY MOTION TO TAKE DEPOSITIONS.

THE COURT: I'M SPECIFICALLY GOING TO DENY THE MOTIONS, MR. HERRMANN. OKAY. BUT WITH THE QUALIFICATION THAT IF YOU NEED ADDITIONAL TIME DURING TRIAL IN ANY

EMERGENCY SITUATION, PLEASE LET ME KNOW AND WE WILL TRY TO ACCOMMODATE THAT.

WHY DON'T WE BRING UP THE JURY. ANY PROBLEM WITH GETTING STARTED WITH JURY VOIR DIRE AT THIS TIME?

MR. MUELLER: NO.

MR. HERRMANN: NONE, YOUR HONOR.

THE COURT: I'M GOING TO TAKE A BRIEF RECESS, COUNSEL, TO GET THEM UP HERE.

(WHEREUPON, A RECESS WAS HAD.)

THE COURT: CRIMINAL CASE 82-20R, UNITED STATES OF AMERICA VERSUS ROBERT SATIACUM AND SILAS A. CROSS.

COUNSEL, PLEASE MAKE YOUR APPEARANCED.

MR. MUELLER: PETER MUELLER FOR THE UNITED STATES, YOUR HONOR.

MR. WILSON: DAVID WILSON FOR THE UNITED

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Q YOU WOULD HAVE ONLY PARTICIPATED IN THE PREPARATION FROM THE MICROFILM FOR THE PRESENTATION HERE TODAY IN COURT?

A THE SIGNATURE CARD ITSELF IS NOT FROM

MICROFILM RECORDS. THE SIGNATURE CARD IS A COPY OF THE ORIGINAL SIGNATURE CARD THAT THE BRANCH HAD ON FILE.

Q I SEE.

A THE REST OF THE RECORDS ARE MICROFILM COPIES.

MR. HERRMANN: OKAY. I HAVE NO OBJECTION TO THE ADMISSIBILITY OF THIS.

THE COURT: IN THAT CASE, EXHIBIT 9 IN ITS ENTIRETY WILL BE ADMITTED.

DIRECT EXAMINATION (CONTINUED)

BY MR. MUELLER:

Q WITHOUT GOING INTO THE SPECIFIC CONTENTS OF EXHIBIT 9, MR. WETMORE, CAN YOU BRIEFLY DESCRIBE HOW EXHIBIT 9 IS ORGANIZED, THAT IS, EXHIBITS 9A THROUGH 9O?

A YES. EACH MONTHLY STATEMENT IS SHOWN AND THEN FOLLOWING THE MONTHLY STATEMENT THE DEPOSIT SLIPS ARE SHOWN AND THEN THE CHECKS THAT ARE PAID AGAINST THE ACCOUNT, COPIES OF THEM FOLLOW THAT. SO

WE HAVE THE STATEMENTS, THEN THE DEPOSITS, THEN THE CHECKS.

Q WITH THE PARTICULAR MONTH INVOLVED?

A RIGHT, FOR EACH MONTH.

Q AND THEN, FOR EXAMPLE, 9B IS THE STATEMENT FOR THE MONTH OF MAY, 1980, IS THAT CORRECT?

RT 7/9/82 p. 557

A YES, FOR THE FULL MONTH, MAY OF '80.

Q DOES THE STATEMENT FOR THE MONTH OF MAY 1980 REFLECT ANY CHECKS OR DEPOSITS FOR THAT MONTH?

A MAY 1980. THE ONLY ACTIVITY IS A SERVICE CHARGE. THERE ARE NO DEPOSITS OR CHECKS.

Q AND THEREFORE THERE'S NOTHING THAT FOLLOWS THAT PAGE, IS THAT CORRECT?

A THAT'S CORRECT.

Q NOW, WITH RESPECT TO JUNE OF 1980, IS THAT EXHIBIT 9C?

A YES.

Q AND 9C, DOES THAT HAVE INCLUDED IN IT

THE STATEMENT, AS WELL AS COPIES OF ALL CHECKS AND DEPOSITS WRITTEN ON THE ACCOUNT DURING THE MONTH OF JUNE?

A YES. THE MONTH OF JUNE HAS THE DEPOSIT THAT WAS MADE AND THE CHECKS THAT WERE PAID AGAINST THE ACCOUNT.

Q AND DOES THAT FOLLOW FOR THE REST OF THE EXHIBITS, 9D THROUGH 9O?

A YES, IT DOES.

MR. MUELLER: COULD THE WITNESS BE SHOWN PLAINTIFF'S EXHIBITS 12, 13, 14, 15 AND 20?

Q PRIOR TO COMING TO COURT, HAVE YOU HAD OCCASION TO EXAMINE THESE EXHIBITS?

A YES, I HAVE.

Q CAN YOU IDENTIFY THEM?

A THESE EXHIBITS ARE CHECKS THAT HAVE BEEN POSTED AGAINST

RT 7/9/82 p. 558

THE ACCOUNT.

Q THE SAME ACCOUNT THAT'S INVOLVED?

A RIGHT, THE SAME ACCOUNT.

Q AND ARE THOSE THEN COPIES OF CHECKS WHICH ARE ALSO INCLUDED IN PLAINTIFF'S EXHIBIT 9?

A YES, THEY ARE.

Q AND WERE THOSE --

MR. MUELLER: I'D OFFER THOSE IN EVIDENCE, YOUR HONOR.

THE COURT: 12 IS ALREADY IN EVIDENCE, AS MY RECORD INDICATES, BUT 13, 15 and 20 WILL BE ADMITTED.

MR. MUELLER: COULD THE WITNESS BE SHOWN PLAINTIFF'S EXHIBITS 22, 24, 25 AND 27.

THE COURT: 22, 24, 25, 27.

MR. MUELLER: YES, I UNDERSTAND THAT 22 AND 24 ARE ALREADY IN EVIDENCE.

THE COURT: YES, THEY ARE. DOES THAT MEAN YOU ONLY NEED 25 AND 27?

MR. MUELLER: YES.

Q 25 AND 27, DID YOU EXAMINE THOSE BEFORE COMING TO COURT TODAY?

A YES, I DID.

Q AND WERE THOSE -- WHAT ARE THEY?

A YES, THOSE ARE ALSO COPIES OF CHECKS THAT ARE POSTED AGAINST THE SAME ACCOUNT THAT WE'VE BEEN TALKING ABOUT,

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CONSULTANT SERVICES UNLIMITED.

Q THOSE INDIVIDUAL CHECKS, ARE THEY ALSO CONTAINED IN EXHIBIT 9 --

A YES.

Q -- UNDER THE APPROPRIATE MONTH?

A YES, CONTAINED IN EXHIBIT 9 UNDER THE APPROPRIATE MONTH, YES.

MR. MUELLER: OFFER 25 AND 27A AND B IN EVIDENCE, YOUR HONOR.

THE COURT: THEY WILL BE ADMITTED.

MR. MUELLER: COULD THE WITNESS BE SHOWN 29, 32, 35 AND 36K?

THE CLERK: I'M SORRY, COUNSEL.

MR. MUELLER: PARDON ME?

THE CLERK: NUMBERS AGAIN.

MR. MUELLER: 29, 32, 35, 36K.

Q HAVE YOU EXAMINED THOSE PREVIOUSLY BEFORE COMING TO COURT TODAY?

A YES.

Q AND CAN YOU IDENTIFY THOSE?

A YES, THESE ARE AGAIN COPIES OF CHECKS THAT ARE POSTED AGAINST THE ACCOUNT AND THEY'RE ALSO -- THE SAME COPIES ARE INCLUDED IN EXHIBIT 9.

MR. MUELLER: OFFER 29, 32, 35 AND 36K IN EVIDENCE, YOUR HONOR.

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THE COURT: THEY WILL BE ADMITTED:

MR. MUELLER: AND COULD THE WITNESS BE SHOWN PLAINTIFF'S EXHIBITS 40, 41 AND 44?

Q HAVE YOU EXAMINED THOSE BEFORE COMING TO COURT TODAY?

A YES, I HAVE.

Q AND CAN YOU IDENTIFY THEM?

A YES, THESE ARE -- THEY'RE COPIES OF CHECKS POSTED TO THE ACCOUNT, PLUS CHECKS THAT WERE INCLUDED ON DEPOSITS IN THE ACCOUNT. THEY'RE COPIES AND ALSO THESE COPIES ARE INCLUDED IN THE EXHIBIT 9.

Q NOW, WITH RESPECT TO THE RECORDS THAT ARE MAINTAINED WITH A PARTICULAR CHECKING ACCOUNT, WHEN A DEPOSIT, SAY, OF A CHECK FROM ANOTHER BANK IS MADE TO THAT ACCOUNT, DOES RAINIER BANK KEEP A COPY OF THE CHECK THAT IS ACTUALLY DEPOSITED, IN ADDITION TO THE AMOUNT BEING DEPOSITED?

A YES. WE KEEP A COPY OF THE DEPOSIT SLIP AND THEN THE ACCOMPANYING CHECKS THAT ARE LISTED ON THAT DEPOSIT SLIP.

Q SO WHEN YOU'VE INDICATED THAT EXHIBIT 9 AND SOME OF THESE EXHIBITS CONTAIN DEPOSITS, DO THEY INCLUDE COPIES OF ANY CHECKS THAT WERE ACTUALLY DEPOSITED INTO THE ACCOUNT?

A YES, THEY DO.

MR. MUELLER: I WOULD OFFER IN EVIDENCE 40, 41 AND 44, YOUR HONOR.

THE COURT: ALL OF 41?

MR. MUELLER: PARDON ME?

RT 7/9/82 p. 561

THE COURT: ALL OF 41?

MR. MUELLER: ALL OF 40 AND JUST 41A.

THE COURT: ALL OF 40 WILL BE ADMITTED. 41A WILL BE ADMITTED.

MR. MUELLER: AND COULD THE WITNESS BE SHOWN --

THE COURT: JUST A MINUTE, COUNSEL. 44?

MR. MUELLER: EXCUSE ME, YOUR HONOR?

THE COURT: WAS 44 BEING OFFERED?

MR. MUELLER: YES, YOUR HONOR.

THE COURT: 44 WILL BE ADMITTED.

MR. MUELLER: 51A AND B, PLEASE.

THE COURT: IS THERE GOING TO ANY OBJECTION TO 51A AND B? WHAT ELSE ARE YOU OFFERING WITH THIS WITNESS, COUNSEL, OR IS THIS IT?

MR. MUELLER: THIS IS THE LAST ONE.

MR. HERRMANN: YOUR HONOR, I'M GOING TO OBJECT AT THIS TIME. I WOULD LIKE TO HAVE ARGUMENT AT SIDEBAR.

THE COURT: ARE YOU OBJECTING TO 51A AND B?

MR. HERRMANN: YES.

THE COURT: WELL, LET'S HEAR THE WITNESS IDENTIFY IT FIRST SO I AT LEAST KNOW WHAT WE ARE TALKING ABOUT BEFORE WE ARGUE IT.

COUNSEL, DO YOU WANT TO HAVE THE WITNESS IDENTIFY 51A AND B?

MR. MUELLER: YES.

RT 7/9/92 p. 562

Q WOULD YOU EXAMINE PLAINTIFF'S EXHIBIT 51A AND B AND TELL ME IF YOU CAN IDENTIFY THOSE, PLEASE?

A EXHIBIT 51A IS A COPY OF A CHECK THAT WAS POSTED AGAINST THE CONSULTANT SERVICES ACCOUNT AND IS ALSO INCLUDED IN EXHIBIT 9.

Q IS 51A A COPY OF THE DEPOSIT SLIP AND A CHECK WHICH WAS DEPOSITED INTO THE CONSULTANT SERVICES UNLIMITED ACCOUNT?

A YES, IT WAS.

Q AND IS THAT ALSO INCLUDED IN EXHIBIT 9

UNDER THE APPROPRIATE MONTH?

A YES.

THE COURT: IS IT IN EVIDENCE ALREADY THEN? IT'S BEEN ADMITTED AS PART OF EXHIBIT 9?

MR. MUELLER: YES. I AM JUST TRYING TO IDENTIFY THESE SEPARATE EXHIBITS.

MR. HERRMANN: I HAVE AN OBJECTION THAT I WOULD LIKE TO -- I DON'T KNOW IF THE COURT WANTS ME TO ARGUE IT IN FRONT OF THE JURY.

THE COURT: WELL, LET'S GO TO SIDEBAR.

(THE FOLLOWING PROCEEDINGS HELD AT SIDEBAR.)

THE COURT: THE DOCUMENT IS ALREADY IN EVIDENCE.

MR. HERRMANN: I UNDERSTAND THAT, YOUR HONOR. I WOULD LIKE TO PUT ON THE RECORD THAT THIS IS EXACTLY

RT 7/9/82 p. 563

THE KIND OF PREJUDICE THAT I MADE MY MOTION

FOR A CONTINUANCE FOR IN THE FIRST PLACE. I BELIEVE THAT FOR US TO PROCEED IN THIS MANNER IS A DENIAL OF DUE PROCESS. I THINK IT IS A DENIAL OF EQUAL PROTECTION. I KNOW HOW TO HAVE NOTEBOOKS HERE THAT ARE CROSS-REFERENCED BETWEEN WITNESSES, BUT --

THE COURT: IF YOU TALK THIS LOUD WE MAY AS WELL NOT HAVE THE SIDEBAR.

MR. HERRMANN: I'M SORRY. I'M NOT TRYING TO. I KNOW HOW TO PREPARE A CASE WHERE IT'S CROSS REFERENCES [sic] AND YOU HAVE THINGS AT YOUR FINGERTIPS AND YOU DO HAVE TIME TO EXAMINE THESE THINGS. I HAVE NOT HAD THE TIME TO DO IT, AND I THINK THAT NOT ONLY THE TIME FOR PREPRATION BUT ALSO THE RULES OF DISCOVERY THAT ALLOW THE PROSECUTOR TO ASSEMBLE ALL THIS INFORMATION OVER A PERIOD OF A YEAR IS IN FACT A DENIAL OF EQUAL PROTECTION, AND I THINK WHAT WE ARE SEEING RIGHT NOW IS FOR ME TO BE BARRAGED WITH 51, 42, 44, 56, THAT KIND OF THING, AND NOT HAVE THE TIME TO EVEN LOOK AT THESE

DOCUMENTS, LET ALONE CROSS-REFERENCE THEM, BECAUSE IT ISN'T --

THE COURT: FIRST OF ALL, COUNSEL, YOU ARE SPEAKING TOO LOUDLY. LET'S FINISH WITH THIS WITNESS. THIS SOUNDS LIKE A VERY GENERAL OBJECTION WHICH DOES NOT GO TO THE SPECIFIC DOCUMENT SO THERE IS NOTHING I CAN CURE AT THIS POINT WITH THE WITNESS. LET'S FINISH THE

RT 7/9/83 p. 572

WE WILL SEE YOU BACK HERE ON MONDAY MORNING. WE WILL START AT OUR USUAL TIME, WHICH IS 9:30. SO IF YOU WILL BE IN THE JURY ROOM NO LATER THAN 9:20.

YOU ARE EXCUSED FOR THE DAY AND IF YOU WILL RETIRE TO THE JURY ROOM NOW, PLEASE. HAVE A NICE WEEKEND.

COUNSEL, IF YOU WILL REMAIN A MOMENT, PLEASE.

(THE JURY RETIRED TO THE JURY ROOM.)

THE COURT: NOW, MR. HERRMANN.

MR. HERRMANN: YOUR HONOR, I DO NOT

WANT TO BE ARGUMENTATIVE AND I DO NOT WANT TO TAKE UP A LOT OF THE COURT'S TIME, BUT I REALLY SINCERELY FEEL A DISABILITY OVER HERE AT THE TABLE TO HAVE SUCH SEVERAL HUNDRED -- WHAT APPEAR TO ME TO BE SEVERAL HUNDRED PAGES OF EXHIBITS RUN AND, BOOM, ADMITTED, EXHIBITS THAT I HAVE NOT HAD PROPER TIME TO THOROUGHLY ANALYZE, AND I MAY HAVE OBJECTIONS TO THE ADMISSIONS OF ADMITTING THEM INTO EVIDENCE THAT ARE BEYOND THE MERE ARE THEY AUTHENTIC. THERE ARE OTHER OBJECTIONS BESIDES THEY ARE -- THEY HAVEN'T LAID THE AUTHENTICITY BASIS, AND I DO FEEL THIS IS A RESULT OF THE SUBJECT MATTER THAT I MADE IN MY MOTION FOR A CONTINUANCE AND FOR THE ABILITY TO TAKE SOME DISCOVERY, AND I GUESS MORE THAN ANYTHING I WANT TO NOTE ON THE RECORD THE PREJUDICE I WAS TALKING ABOUT IS REAL.

THE PROSECUTION IS HERE WITH EVERYTHING ALL TABBED, INDEXED, AND CROSS-REFERENCED. I KNOW HOW TO PREPARE A

RT 7/9/82 p. 574

NOW, IF YOU'RE FEELING THAT YOU MAY HAVE HAD SOME BUT THAT YOU FELT PRESSURED INTO SOME KIND OF AGREEMENT TO EXHIBIT 9, IF THAT'S YOUR OBJECTION, LET ME KNOW AND I WON'T HOLD YOU TO IT.

MR. HERRMANN: FOR INSTANCE, WHAT HAVE WE EVEN ADMITTED? LIKE 15, MAY I ASK THE COURT WHETHER WE ADMITTED ALL OF 15 OR JUST 15A?

THE COURT: AS I UNDERSTAND IT -- HOLD ON A MINUTE -- WE HAVE ONLY ADMITTED 15A.

MR. HERRMANN: A?

THE COURT: THAT'S ALL THAT'S BEEN OFFERED; A.

MR. HERRMANN: JUST 15A?

THE COURT: 15A.

MR. HERRMANN: YOUR HONOR, MY OBJECTION IS REALLY NOT TO THE ADMISSION OF THESE RECORDS. I THINK THAT PROBABLY MOST OF THESE RECORDS WOULD COME IN, AND I'M

REALLY NOT MAKING AN OBJECTION HERE TO THE ADMISSIBILITY OF THESE RECORDS. WHAT I'M TRYING TO REGISTER TO THE COURT HERE IS THAT I FEEL PREJUDICED AND I FEEL MY CLIENT IS TO SOME EXTENT BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS FAR AS THE CROSS-EXAMINATION, THE KINDS OF OBJECTIONS THAT I COULD BE RAISING OR MIGHT NOT BE RAISING; I DON'T KNOW. I'M -- I FEEL THAT I'M PREJUDICED AT THIS TIME.

THE COURT: I THINK SOME OF THAT MAY BE CURED

RT 7/21/82 p. 2143

MATERIAL CONTAINED IN THEM, AND I HAVE REQUESTED SOME RESEARCH ON IT AND I WILL WANT TO REFER YOU TO THE CASE OF U.S. V. TIERNEY, IT'S A 9TH CIRCUIT CASE, 424 F.2D 643, WHICH LOOKS PRETTY CLOSE IN POINT, IF YOU LOOK PARTICULARLY AT HEADNOTE NUMBER SEVEN. IT WOULD INDICATE THAT WHERE -- OR AT LEAST THE WAY THE COURT READS IT IT WOULD INDICATE THAT WHERE THE WITNESS CONCERNED IS

THE DEFENDANT'S OWN WITNESS, THAT IN FACT THE NEED FOR THE GRAND JURY TESTIMONY WOULD NOT BE ONE THAT THE COURT HAS TO COPE WITH AND THAT IT WOULD NOT BE ERROR FOR THE COURT TO DENY THE GRAND JURY TRANSCRIPTS.

I GUESS WHAT I WOULD LIKE FROM YOU IS ANY AUTHORITY TO THE CONTRARY YOU SEE. I THINK WE ALL KNOW THAT ANY GRAND JURY TESTIMONY CAN ONLY BE PRODUCED ON A SHOWING OF PARTICULARIZED NEED. NOW, WHERE THERE IS A NEED FOR IMPEACHMENT I CAN SEE THE PARTICULARIZED NEED, BUT AS FAR AS POSSIBLE EXCULPATORY STATEMENTS MADE BY THE DEFENDANT'S OWN FAVORABLE WITNESSES, I HAVE REAL TROUBLE SEEING A NEED THERE.

I AM JUST GIVING YOU THE AUTHORITY I AM GOING ON AND MY TENDENCY RIGHT NOW IS TO SAY NO.

MR. HERRMANN: I UNDERSTAND THE COURT'S RULING, AND IF WE CAN COME UP WITH SOMETHING TO THE CONTRARY, WE WILL PROVIDE IT. IF NOT, WE WON'T.

THE COURT: I MUST SAY THAT FACED WITH 100 OR

RT 7/21/82 p. 2144

MORE PAGES OF GRAND JURY TESTIMONY, IF THERE IS REALLY NO RIGHT TO IT, THE COURT WOULD JUST AS SOON NOT REVIEW THAT IN ITS SPARE TIME.

MR. HERRMANN: I UNDERSTAND.

THE COURT: IF YOU CAN COME UP WITH SOMETHING, PLEASE LET ME KNOW. IF NOT, THAT WILL BE THE RULING, AND I WILL SEE YOU ALL BACK HERE TOMORROW AT 9:30.

OH, ONE OTHER THING, MR. HERRMANN. I DID SPEAK TO JUDGE RAMIREZ TODAY. I WANTED TO STRAIGHTEN OUT ONE THING. WHEN I SAW THE DOCUMENTATION THAT HAD BEEN FURNISHED HIM I BECAME SOMEWHAT CONCERNED BECAUSE THE DOCUMENTATION FRANKLY MADE IT LOOK AS IF THIS WAS THE COURT'S REQUEST, THAT THE COURT WANTED TO SEE THIS MATERIAL IN CAMERA AND THAT THE COURT INVITED YOU TO DO THIS, AND I THOUGHT IT WAS PRETTY CLEAR THAT THIS WAS

DEFENDANT'S CONCERN AND ALL THE COURT SAID WAS THAT THIS SHOULD BE TAKEN UP IN SACRAMENTO WITH THE JUDGE THERE AND I FOR ONE WAS NOT INVITING IT IN ANY OTHER WAY THAN SAYING IT WASN'T THE CONCERN OF THIS COURT, IT WAS THE CONCERN OF ANOTHER COURT.

I EXPLAINED THAT TO JUDGE RAMIREZ. WE DISCUSSED IT. I STILL THINK THAT IS GOING TO BE A DECISION THEY MAKE IN TERMS OF THEIR POLICY ON PRE-SENTENCE RELEASE, BUT ULTIMATELY HE IS PROBABLY GOING TO LEAVE SOME OF THE DECISION AS TO WHAT WOULD BE RELEVANT IN TERMS OF THE

APPENDIX H

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET
U.S. vs. CROSS, Silas, et. al.
CR 82-20T

DATE	Document NO.	PROCEEDINGS
1982		
May 6	1 INDICTMENT	
May 6	2 ORDER (PKS)	fixing bail at PR, BW shall not be issued as to Cross
May 6	3 ORDER(PKS)	fixing bail at PR, BW shall not be issued as to Satiacum
May 7	4. PRAECIPE	deft CROSS, for iss of summons for deft to appear 5-12-82, 9AM, JLW: ISS 5-10-82
May 7	5. PRAECIPE	deft SATIACUM, for iss of summons for deft to appear 5-12-82, 9AM, JLW: ISS 5-10-82
May 7	6. LETTER	to deft SATIACUM, setting arraignment for 5-12-82, 9AM, JLW

12 May	7.	ENT(JLW)	ARRAIGNMENT (SATIACUM & CROSS): AUSA Mueller, deft cnsl Immelt (SATIACUM) and Emory (CROSS). Deft's pres pursuant to summons w/cnsl. Deft's advised of rights & charges. Both deft's enter PLEA of NOT GUILTY to charges. Court accepts & enters pleas. PTM: 5-26-82; STD: 7-21-82; TRIAL: 7-6-82, 9:30 AM, BJR. Deft's released on PR bonds.
12 May	8	APPEARANCE BOND	deft SATIACUM; deft req'd to sign-in in Tacoma (PR)
12 May	9	APPEARANCE BOND	deft CROSS; deft req'd to sign-in in Tacoma (PR)
May 13	10	RETURN	Marshal's, of summons to deft SATIACUM, exc 5-10-82
May 13	11	RETURN	Marshal's, of summons to deft CROSS, exc 5-10-82
May 26	12	MOTION & AFFT.	deft. SATIACUM for continuance of trial and pretrial mtns.

May 26	13	NOTICE	of deft. SATIACUM mtn. (#12) set for 6/4/82 9:30 BJR
May 26	14	MOTION	of deft. CROSS for continuance of trial & filing mtns. dates
May 26	15	NOTICE	of deft. CROSS mtn. (#14) noted for 6/4/82 9:30 BJR

May 26	16	MOTION	deft. CROSS for severence
May 26	17	MEMORANDUM	Deft. CROSS in support of severance
May 26	18	NOTICE	of Mtn. for Severance (#16) for 6/4/82 9:30 BJR
May 28	19	PRAECIPE	for iss of 30 subp to testify:ISS
June 3	20	RESPONSE	govt's, to defts' mtns for continuance of trial & pretrial mtns dates
June 3	21	OPPOSITION	govt's, to deft CROSS' mtn for severance
June 15	22	ORDER(BJR)	DENYING deft CROSS' mtn for severance cc: cnsl

June 15 23 APPLICATION & ORDER (PKS) for writ of H/C ad testificandum ISS 6-15-82

June 16 LODGED deft SATIACUM'S waiver of jury trial

June 21 24 RETURN subp to testify iss to Northwest Airlines exc 6-16-82

June 22 25 WAIVER deft CROSS, of use of stmnts made by witness Fourstars to cnsl

**June 16 26 STIPULATION between deft CROSS & atty Emery for substituting atty Charles Herrmann for Emery

**June 16 LODGED Order substituting attys for deft CROSS

June 23 27 RETURN subp to testify iss to Caesar's Palace exc 6-21-82

June 24 28 PRAECIPE for iss of 30 subp to testify: ISS

June 25 29 RESPONSE govt's, to deft CROSS' waiver concerning conflict of interest

June 28 30 MOTION deft CROSS, for leave allowing cnsl to file mtns

June 28 31 AFFIDAVIT deft CROSS, in support of mtn #30

June 28 LODGED Order for leave allowing cnsl to file mtns

June 28 32 NOTICE deft CROSS, of mtn #30 on 6-30-82

June 28 33 MOTION deft CROSS, for discovery of Jencks materials & to produce documents, stmnts & individuals at trial

June 28 34 MOTION deft CROSS, for order allowing cnsl for deft CROSS to voir dire prospective jurors

June 28 35 MEMORANDUM deft CROSS, in support of mtn #34

June 28 LODGED Order granting mtn to voir dire jurors

June 28 36 MOTION deft CROSS, to shorten time for hrg deft CROSS' mtns #33 & 34

June 28 LODGED Order shortening time for hrg mtns #33 & 34

June 28 37 NOTICE deft CROSS, of mtns #33 & 34 for 6-30-82

June 28 38 MOTION deft CROSS, for change of venue

June 28 39 MEMORANDUM deft CROSS, in support of mtn #38

June 28	LODGED Order	for change of venue
June 28	40 MOTION	deft CROSS, to shorten time for hrg mtn #38
June 28	LODGED Order	shortening time for hrg mtn #38
June 28	41 NOTICE	deft CROSS, of mtn #38 for 6-30-82
June 28	42 RETURN	subp to testify iss to Mel Toulou exc 6-23-82
June 28	43 NOTICE	govt's, of intent to use admission or confession for deft SATIACUM
June 28	44 NOTICE	govt's, of intent to use admission or confession for deft CROSS
June 29	45 ORDER(BJR)	DENYING mtn for leave to file mtns
June 30	46 OPPOSITION	govt's, to deft CROSS' mtn for change of venue
July 1	47 PROPOSED JURY INSTRUCTIONS	deft CROSS
July 1	48 PROPOSED QUESTIONS	for prospective jurors for deft CROSS
July 1	49 REQUESTED INSTRUCTIONS	govt's

July 1 50 BRIEF govt's, for trial

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July 2 51 ENT(BJR) CONFERENCE: AUSA Mueller, def cnsl Immelt, Emery & Herrmann, CR Roth, defts CROSS & SATIACUM prnst on bond. Court finds no conflict & will allow atty Herrmann to participate in case as cnsl for deft CROSS. Cnsl for govt approves jury waiver as to deft SATIACUM.

July 2 52 ORDER(BJR) substituting attys for deft CROSS; Charles J. Herrmann for Arthur J. Emery, Jr. cc: cnsl

July 2 53 ORDER(BJR) waiving jury trial for deft SATIACUM cc: cnsl

July 6 54 PRAECIPE for iss of 12 subp to testify & 12 subp DT: ISS 7-6-82

July 6 55 PRAECIPE for iss of 15 subp to testify: ISS 7-6-82

July 6 56 ENT(BJR) 1ST DAY OF JURY TRIAL FOR CROSS & COURT TRIAL FOR DEFT SATIACUM: AUSA Mueller & Wilson, def cnsl Immelt & Herrmann, CR Roth, defts prsnt on

			bond. Deft CROSS' renewed mtn to sever DENIED. Deft CROSS' mtn in limine to stand submitted. Deft CROSS' oral mtn to continue trial DENIED. Deft CROSS' renewed mtn for change of venue DENIED. Jurors sworn & impanelled. Witnesses testify. Trial cont'd 7-7-82, 1:30AM.
July 6	57	EXHIBITS	deft CROSS, in support of oral mtn for continuance of trial
July 6	58	MOTION	deft CROSS, in limine
July 7	59	RESPONSE	govt's, to deft CROSS' mtn in limine
July 7	60	RESPONSE	govt's, to deft CROSS' claim of w/holding exculpatory material
July 7	61	PRAECIPE	for iss of 10 subp DT:ISS 7-7-82
July 7	62	PRAECIPE	for iss of 10 subp to testify: ISS 7-7-82
July 6	63	ADDITIONAL VOIR DIRE	
July 6	64	PEREMPTORY CHALLENGES	all cnsl

[End of first four pages of eleven page Docket]